

5-29-2012

# American Bank v. Wadsworth Golf Construction Co Clerk's Record v. 23 Dckt. 39415

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Vol 23 of 25

**SUPREME COURT**  
OF THE  
**STATE OF IDAHO**

AMERICAN BANK,

Plaintiffs-Cross Defendant-Appellant,

v.

WADSWORTH GOLF CONSTRUCTION COMPANY OF,  
THE SOUTHWEST, etal.,

Defendant-Cross Defendant-Respondent-  
Cross-Appellant,

and

TAYLOR ENGINEERING, INC., etal.,

Defendant-Third Party Plaintiff

and

BRN DEVELOPMENT, INC., etal,

Defendants-Cross-Defendants,

*Appealed from the District Court of the First Judicial District of  
the State of Idaho, in and for the County of Kootenai.*

RANDALL A. PETERMAN  
C. CLAYTON GILL  
TYLER J. ANDERSON  
PO Box 829  
Boise, ID 83701  
Attorneys for Appellant

TIMOTHY M. LAWLOR  
422 W Riverside Ave #1100  
Spokane, WA 99201  
Attorney for Taylor Engineering

EDWARD J. ANSON  
608 Northwest Blvd #300  
Coeur d'Alene, ID 83814  
Attorney for Respondents

JOHN R. LAYMAN  
Spokane Division, St  
Spokane, WA 99202  
Attorney for BRN etal

39415

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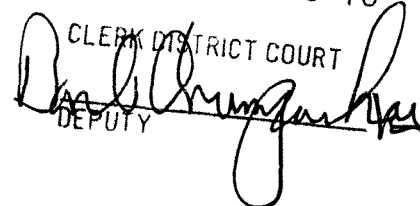
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COUNTY OF KOOTENAI } SS  
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Steven C. Wetzel, ISB #2988  
Kenneth Huitt, ISB# 8257  
JAMES, VERNON & WEEKS, PA  
1626 Lincoln Way  
Coeur d'Alene, Idaho 83814  
Telephone: (208) 667-0683  
Facsimile: (208) 664-1684  
[swetzel@jvwlaw.net](mailto:swetzel@jvwlaw.net)  
[khuitt@jvwlaw.net](mailto:khuitt@jvwlaw.net)

Attorneys for Defendant ACI NORTHWEST, INC.

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

AMERICAN BANK, a Montana banking  
corporation,

Plaintiff,

vs.

BRN DEVELOPMENT, INC., an Idaho  
corporation, BRN INVESTMENTS, LLC,  
an Idaho limited liability company, LAKE  
VIEW AG, a Liechtenstein company,  
BRN-LAKE VIEW JOINT VENTURE, an  
Idaho general partnership, ROBERT  
LEVIN, Trustee for the ROLAND M.  
CASATI FAMILY TRUST, dated June 5,  
2008, RYKER YOUNG, Trustee for the  
RYKER YOUNG REVOCABLE TRUST,  
MARSHALL CHESROWN, a single man,  
-THORCO, INC., an Idaho corporation,  
CONSOLIDATED SUPPLY COMPANY,  
an Oregon corporation, THE TURF  
CORPORATION, an Idaho corporation,  
WADSWORTH GOLF CONSTRUCTION  
COMPANY OF THE SOUTHWEST, a

Case No. CV09-2619

ACI NORTHWEST, INC.'S  
MEMORANDUM IN OPPOSITION TO  
AMERICAN BANK'S MOTION FOR  
SUMMARY JUDGMENT AGAINST  
ACI ON INVALIDITY OF ACI'S  
CLAIM OF LIEN (COUNT THREE OF  
ACI'S CROSS-CLAIM)

ACI NORTHWEST, INC.'S MEMORANDUM IN OPPOSITION TO AMERICAN BANK'S  
MOTION FOR SUMMARY JUDGMENT AGAINST ACI ON INVALIDITY OF ACI'S  
CLAIM OF LIEN (COUNT THREE OF ACI'S CROSS-CLAIM) - 1

1803



Delaware corporation, POLIN & YOUNG  
CONSTRUCTION, INC., an Idaho  
corporation, TAYLOR ENGINEERING,  
INC., a Washington corporation,  
PRECISION IRRIGATION, INC., an  
Arizona corporation and,

Defendant.

And

TAYLOR ENGINEERING, INC., a  
Washington corporation,

Third-Party Plaintiff,

v.

ACI NORTHWEST, INC., an Idaho  
corporation; STRATA, INC., an Idaho  
corporation; and SUNDANCE  
INVESTMENTS, LLP, an Idaho limited  
liability limited partnership,

Third-Party Defendants.

And

ACI NORTHWEST, INC., an Idaho  
corporation,

Crossclaimant,

v.

AMERICAN BANK, a Montana banking  
corporation, BRN DEVELOPMENT, INC.,  
an Idaho corporation, BRN  
INVESTMENTS, LLC, an Idaho limited  
liability company, LAKE VIEW AG, a  
Liechtenstein company, BRN-LAKE  
VIEW JOINT VENTURE, an Idaho  
general partnership, ROBERT LEVIN,  
Trustee for the ROLAND M. CASATI  
FAMILY TRUST, dated June 5, 2008,

RYKER YOUNG, Trustee for the RYKER  
YOUNG REVOCABLE TRUST,  
MARSHALL CHESROWN, a single man,  
THORCO, INC., an Idaho corporation,  
CONSOLIDATED SUPPLY COMPANY,  
an Oregon corporation, THE TURF  
CORPORATION, an Idaho corporation,  
WADSWORTH GOLF CONSTRUCTION  
COMPANY OF THE SOUTHWEST, a  
Delaware corporation, POLIN & YOUNG  
CONSTRUCTION, INC., an Idaho  
corporation, TAYLOR ENGINEERING,  
INC., a Washington corporation,  
PRECISION IRRIGATION, INC., an  
Arizona corporation and,

Crossclaim Defendants.

Come now Third Party Defendant and Cross-Claimant ACI NORTHWEST, INC.

("ACI"), by and through its attorneys of record, James, Vernon & Weeks, PA, and submits this memorandum in opposition to American Bank's Motion for Summary Judgment Against ACI on Invalidity of ACI's Claim of Lien (Count Three of ACI's Cross-Claim).

### INTRODUCTION

Since 1889, Idaho has had a long history of protecting the rights of laborers. During the Idaho Constitutional Convention of 1889, the importance of the rights of laborers, mechanics, and material men was given great weight and thought. In discussions regarding whether to establish a board of labor, J.W. Reid, a delegate from Nez Perce County stated as follows:

I think that those who are laborers, what are called laboring men...shall have the opportunity of being heard once a year through a commissioner, who will gather from the factories, mines and mills and all the various avocations of labor throughout the state, such information as bears upon their special interest, which is one of very great importance, and we should not cut them off from opportunity of being heard in that formal and proper manner.

Proceedings and Debates of the Constitutional Convention of Idaho, 1889, p. 1374. The recognition of the special interests and important roles of laborers was echoed by another delegate, A. M. Sinnott, from Elmore County who stated,

Labor in itself is noble and holy. By labor is brought forth the fruits of the earth; by labor is brought forth everything which we enjoy, and which contributes to our happiness and prosperity, even to the ditch of the member from Ada, which he so warmly advocates sometimes. ...as the heart is to the body so is labor to capital. If the heart stops beating, the body dies. If labor stops, the world itself will eventually stop, and suffer death all around.

*Id.* p. 1376.

The result of the above discussions was a board of labor was established. The delegates also discussed mechanic's liens. Delegate Reid stated,

I do not know but what under the general statute the legislature would have power to provide adequate liens, but I have noticed it in some constitutions; it is well enough to put it in and put it in the form of "shall do it;" it makes it compulsory then upon them to do it and provide a proper mechanic's lien. It is a short section, it won't encumber the constitution much, and it is well enough to emphasize it in that way.

To which another delegate replied and was answered,

Mr. Shoup. Wouldn't the legislature have power to do that without the constitutional authorization?

Mr. Reid. I think so; but there we make it obligatory upon them by saying they shall do it.

*Id.* p. 1389. As a result of these discussions our mechanic's lien laws and the protection of providers of labor and materials are grounded in our state's constitution.

Without protecting the rights of laborers and material men to receive the payment they rightly deserve from the work and time expended on projects, we are turning our backs on the vision and intentions of the founders of our state. Opposing counsel wishes this Court to disregard the purpose of our laws and our constitution in relation to laborers and to allow them to

be driven into bankruptcy by hyper-technical interpretation of Idaho law. Such a practice not only harms the individuals involved but harms the economic prosperity of our state that has been recognized since 1889.

There is always danger in missing the forest for the trees; opposing counsel keeps pointing to the trees. The layout of the forest is this: ACI was hired by BRN to work on the Black Rock golf development project. Not a portion of a project but the entire blue printed project. It is uncontested that everyone involved understood that the end goal was a golf development with residential housing. Each hired contractor worked on aspects of the project that contributed to the end goal which was a completed golf development community. After expending this time, money and labor, with the contractual obligation of payment as perceived safety net, ACI held up its end of the bargain and helped devise strategies and contributed to the development. When ACI was not paid, it filed a lien for the work it had done on the project, giving adequate notice to all including AMERICAN BANK and BRN that it had not been paid. The laws that should be protecting ACI are now being manipulated by AMERICAN BANK, or actually the title insurer, so as to leave contractors without payment of all sums rightfully due.

**1. ACI's Claim Of Lien Is Timely Because ACI Performed Work For One Integrated Project And The Claim Of Lien Was Filed Within Ninety Days Of Substantial Completion.**

In order for a claim of lien to be valid the "claim shall be filed within ninety (90) days after the completion of the labor or services, or furnishing of materials." Idaho Code § 45-407(2). AMERICAN BANK attempts to eliminate ACI's right to be paid in full through a "form over substance" argument. AMERICAN BANK alleges that there are twelve separate independent contracts between ACI and BRN. Such an allegation is factually inaccurate and,

even if true, Idaho law would not support the travesty of justice proposed by AMERICAN BANK.

**1.1 The Project Was One Integrated Construction Job To Construct A Golf Course Community**

AMERICAN BANK attempts to challenge the one lien filed on the project by claiming that the project was made up by separate contracts, each needing a separate claim of lien. This position was not the basis for the loan, and AMERICAN BANK should be estopped to assert otherwise at this late date.

Mark Hendrickson was Chief Operating Officer for AMERICAN BANK when the subject loan was made. Mr. Hendrickson "was acting in the capacity of a loan officer in this case."<sup>1</sup> In that duty, he created a document entitled Loan Approval and Instructions which contained a standard credit display.<sup>2</sup> "This is the document that summarizes the bank's analysis of the transaction."<sup>3</sup>

The project was described as follows in the standard credit display:

Black Rock North will be an upscale residential development with an 18-hole golf course with a 27,500 square foot clubhouse, equestrian center, kids' camp, and other recreational improvements. Profits from the Project are estimated at \$42MM. Though slowing, current local and national market trends appear supportive of the project. . . . The infrastructure contractor is ACI Northwest Inc. ("ACI"), who acted in similar capacity for The Club at Black Rock project.

\*\*\*

The property is approved for a residential Planned Unit Development (PUD) consisting of an 18-hole championship golf course including a 27,500 square foot clubhouse and maintenance facility, executive (par 3) course, equestrian center, and kids camp.

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<sup>1</sup> Wetzel Affidavit: 11-15-11; Exhibit B; Hendrickson depo. p. 19, ll. 3-6.

<sup>2</sup> Wetzel Affidavit: 11-15-11; Exhibit B; Hendrickson depo. p. 78, ll. 19-21.

<sup>3</sup> Wetzel Affidavit: 11-15-11; Exhibit B; Hendrickson depo. p. 78, ll. 15-16.

The preliminary development plan indicates a total of 325 residential units. A total of the 198 single-family detached lots will range in size (average from 0.93 acres to 11.0 acres).

\*\*\*

The golf course traverses throughout the site consisting of approximately 195 acres, while the Par 3 course will locate on 40 acres. Other support buildings on site include a clubhouse, and a maintenance building and weather shelters/restrooms. . . . Having the availability of 36 holes (plus Par 3) for play is a major advantage over similar second home project in the western section of the United States.

The project was one integrated construction endeavor. In fact, it was an approved planned unit development under the Kootenai County zoning ordinance.

“A planned unit development (PUD) is an integrated design for development of residential, commercial or industrial uses, or combinations of uses, under single ownership or control in which standards of this title may be varied.” Ordinance No. 401, May 24, 2007, p. 15 and restated in Section 9-15-1 of zoning ordinance.

This Court has already ruled in the Wadsworth trial, finding of fact #23. At trial, Kyle Capps, BRN Development’s project manager, “testified that the business plan, and the hope of BRN Development, was that the golf course would add value to the project.”<sup>4</sup>

AMERICAN BANK claims twelve “contracts” existed between ACI and BRN. There is no proof of such an allegation. There are job numbers and there are invoices, but these are internal documents. BRN used two job numbers separating the golf course and residential development portions of the project in internal accounting for categories. The “Contract Agreements” on which AMERICAN BANK relies do have an appearance of separate transactions, but in reality the separation did not exist. ACI was always the sole infrastructure

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<sup>4</sup> Memorandum Decision, Findings of Fact, Conclusions of Law, and Order Following Court Trial (Wadsworth), p. 13.

mass excavation contractor. ACI was working long before the design was completed. In order to organize work, designed and ready, separate piecemeal documents were prepared by BRN, though labeled "Contract Agreement" they are not separate projects. They are steps in the completion of a golf course community. The "Contract Agreement" is a misnomer, but it was the available form. Each "Contract Agreement" flows to the next with some overlapping time and billing. AMERICAN BANK's argument is elevating form over substance to avoid the application of the law and the spirit of the lien statute.

**1.2 Law Cited By AMERICAN BANK Does Not Support AMERICAN BANK's Legal Conclusion.**

Even if the conclusion urged by AMERICAN BANK was correct, the error in the analysis is that Idaho mechanic and materialmen lien laws place the 90-day restriction at the completion of the "labor or services." The contract argument is nothing more than a "Red Herring." Here, the project was to build a golf course community, which happened to be documented in a series of documents, including but not limited to the "Contract Agreements", oral agreements, change orders, and time and material requests. But, all of them evidence labor, services and materials being supplied to one project.

Idaho Code § 45-501 specifies the right to lien. It states:

Every person performing labor upon, or furnishing materials to be used in the construction . . . or who grades, fills in, levels, surfaces or otherwise improves any land . . . has a lien upon the same for the work or labor done . . . .

There is no reference in Idaho Code § 45-501 in regard to the limitation by a written contract as argued by AMERICAN BANK.

Idaho Code § 45-506 specifies that:

The liens provided for in this chapter shall be on equal footing with those liens within the same class of liens without reference to the date of the filing of the lien



claim or the claims and are preferred to any lien, mortgage or other encumbrance, which may have attached subsequent to the time when the building, improvement or structure was commenced . . . .”

According to this statute, ACI’s lien is superior to that of AMERICAN BANK and, again, there is no reference to the word “contract.”

In Idaho Code § 45-507 the restrictions for the claim of lien are included. And, again, the statute refers to labor or services, or furnishing materials. It does not refer to any “contract.” It is not the contract, but rather it is the completion of the labor or services, or furnishing of materials which is the keystone for the lien theory set forth in Idaho Code for mechanics and materialmen. There is essentially no statute that is supportive of AMERICAN BANK’s argument. However, AMERICAN BANK claims that such a restriction has come into existence through case law. First, AMERICAN BANK cites to *Terra-West, Inc. v. Idaho Mut. Trust, LLC*, 150 Idaho 393, 247 P.3d 620 (2010). AMERICAN BANK quotes the court, stating:

[S]o long as a lien is filed within ninety days after the completion of the labor or services, the lien may encompass the entirety of the work performed under a single contract.

*Id.* 247 P.3d at 627.

AMERICAN BANK claims, based upon this statement, that the law is that the lien must relate to each single contract. That was not the holding of the case, and ACI would argue that the inclusion of the entirety of the work performed under a single contract is nothing more than dicta. The dicta may have been useful in explaining the court’s fact analysis, but it is not the holding of the court.

The *Terra-West* court’s analysis refers back to a number of hyper-technical arguments made by Idaho Mutual similar to the kinds of arguments AMERICAN BANK is making, and

dispose of each. *Terra-West, Inc.* is as much a pleadings case as it is a lien case. And in the end, the court concluded:

That the filing of the motion for leave to amend the complaint commenced proceedings within the statutory time period and we therefore affirm the order of the district court granting leave to file the amended complaint.

*Id.* 247 P.3d at 628.

The *Terra-West* case involved two separate liens. One filed on December 6, 2007, and the second lien filed on August 12, 2008. Terra-West attempted to bootstrap the sums owed on the first lien into the second lien through an amendment of a complaint. Intuitively, this is a far more egregious action than using and foreclosing on one lien for a project as claimed in the present case. Yet, the district court finding the constitutional mandate and the requirement that the statute be liberally construed in favor of the lien claimant determined that the second lien could relate all the way back to the commencement of the project. The court found that the invalid lien was wholly irrelevant in the litigation of the second lien. Although the Supreme Court in *Terra-West* put special emphasis in support of the decision on the fact that there was one contract that Terra-West was working on, the court does not hold that there must be one contract in order to file a lien for all the labor and services on one project.

The *Terra-West* case primarily relies upon *White v. Constitution Mining and Milling Company*, 56 Idaho 403, 404; 55 P.2d 152 (1936). In that case, the cross-appellants argued that:

The wages of a superintendent are lienable when his employment involves personal manual labor constituting one entire indivisible employment, performance of manual labor bringing the whole service within the lien statute. (I.C.A., sec. 44-501; 40 Corpus Juris, "Mines and Minerals," sec. 845, p. 1166; *Idaho Min. etc. Co. v. Davis*, 123 Fed. 396; *Thompson v. Wise Boy Min. etc. Co.*, 9 Ida. 363, 74 Pac. 958; *Naylor v. Lewiston etc. Ry. Co.*, 14 Ida. 789, 96 Pac. 573.

The Supreme Court allowed the employment liens to be foreclosed with the higher priority than the lender. The *Terra-West* case is important from the perspective of dealing with two liens and the intricacies of amendment of a foreclosure complaint. But the reference to “under a single contract” is a reference to the facts, and every case for lien foreclosure is fact specific. It is not an indication that the rule in the State of Idaho is that when you have one all encompassing project that any separate “contracts” in reaching the completion of the project must have separate liens. A lien filed for the entirety of the project is valid under the Idaho lien statute.

AMERICAN BANK also relies on *Valley Lumber & Manufacturing Co. v. Driessel*, 13 Idaho 662, 93 P. 765 (1907). First, this case is very different for a number of reasons. It involves a materialman and it involves two very separated projects, each with a separate contract. The original contract was for a residence that was completed on January 16, 1905. On March 13, 1905, 49 days after the delivery of the last items of material under the first contract, the owner was convinced by his tenants, renting the new structure, to build a porch. This was done in a separate contract with the general contractor. The lumber company then filed a lien for both the house and the porch after not being paid for the materials. The court noted that the house was constructed under one contract and the porch was constructed under another separate contract. The contract for the porch was not made until about 59 days after the materials for the construction of the home had been delivered. (Note that at this time the State of Idaho required that the lien be filed within 60 days of the supplying of the last materials.)

The lumberman had also presented the contractor with an itemized statement of all of the lumber furnished for the construction of the house, which the court found to be very suggestive of the fact that the respondent was informed that the building was completed. The court

approvingly held that a materialman cannot tack one contract onto another so as to procure a lien for all of the materials. But the situation is one of a materialman and the obviousness of the separation of the projects. Again, the “contracts” reference the timing and the differences of the project; the designation is simply convenient for the court’s factual analysis. But to claim that the case holds that each contract must have a lien is no more sensible than saying the law of Idaho, since *Valley Lumber*, is that every porch must have a separate lien from the residence to which it is attached. The court goes on to state:

Where materials are furnished for the same building or improvement in installments and at intervals, and the parties intend them to be included in one account in settlement, the entire account will be treated as a continuous and connected transaction, and the lien limitation begins to run from the last item of the contract.

13 Idaho at 670

In the end, the court concluded that the judgment of the lower court which was rendered in favor of Valley Lumber would be sustained. The language which AMERICAN BANK relies upon is interesting dicta, but it was not the basis of the decision in *Valley* and should not be the basis of a decision in the present case.

Next, AMERICAN BANK requests that this Court rely on a district court decision by Judge Patrick Owen in the *Tamarack* foreclosure proceeding. In that case, Teufel Nursery, Inc. (“Teufel”) provided landscaping services to Tamarack Resort between 2004 and early 2008. The case is very different from the present case in that Teufel was working one small part of a very large project, while ACI was essentially the project contractor in regard to all infrastructure and mass excavation. Although we do not have an exact copy of the Teufel contracts, the description of the court certainly makes the contracts appear significantly different from the documents in the present case. The court said that the 2004 contract between Tamarack and Teufel detailed

eleven specific tasks and such other tasks as may be directed by the owner's representative. The court deemed this to be plain and unambiguous. In the present case, the scope is far more general and there was a far different reason for why the generalities were necessary. That is, ACI could not do the work or have a complete contract for the whole project because it had not been designed.

Judge Owen also put special emphasis that Teufel had no employees at the site after about December 23, 2004 until spring 2005 and that there were only limited Teufel employees at the site during the 2006 winter season. The court seemed to put special emphasis on the fact that since there was not continuous activity by the landscapers, that it could not be a single continuous contract. That is very different from the present case. From the date that ACI went to work, they never stopped working, weather permitting, until the funds stopped at the last day of work specified on the lien.

Judge Owen's decision has also placed special emphasis on the landscape construction agreements. He has been convinced by lenders to not focus on the "labor and materials" but rather to focus on the contracts, the written document, which is not at all what the Idaho statute states. The *Teufel* decision is not relevant to the present case in that it is a very different factual situation. Furthermore, the *Teufel* decision is wrong. The statutory law of Idaho makes no reference to "contract." Judge Owen misreads dicta as a holding. There is no such holding because there is no such statute. The court is to be focusing on labor and material, not documents that are being used by a lender to prevent a contractor from being paid for labor and materials as constitutionally mandated in Idaho.

### **1.3 The Law Of Idaho Does Not Require A Lien For Every Contract.**

As has been previously argued, a review of the Idaho statutory law which is enacted to fulfill the constitutional requirements of Article XIII § 6 does not focus on contract and the determination of one document versus another document. The focus is on labor and materials and when the initial labor and materials were supplied. Article XIII § 6 states, “adequate lien on subject matter of their labor.” Idaho Code § 45-501, §45-506 and § 507 references “labor” or “services or “furnishing of materials.” There is no reference to “contract.” The cases that have been cited by AMERICAN BANK are not concluding that every single contract within one continuous project have separate liens in the event of failure to pay. In a continuous project, there may be a number of portions of the project set out in writing, but that is only a portion of the project and not the entirety. The Idaho statute does not make the distinction that AMERICAN BANK request this court accept. Furthermore, what AMERICAN BANK is requesting is that every contractor would need to make a separate lien for every portion of a project if there are separate written documents for portions of the project. This is inconsistent with the statute, the constitution, and judicial efficiency. The argument is nothing more than a “Red Herring” created by a title insurer to avoid responsibility since it was the title insurer that failed to complete the duties required to assure AMERICAN BANK was in a first position.<sup>5</sup>

#### **1.4 The Work At ACI And Black Rock North Was One Continuous Account**

The issue to address is at what date does the ninety (90) days commence. In *Baker v. Boren*, the Court of Appeals of Idaho states the applicable test to determine whether the claim of lien is timely:

While the time fixed in the contract for the completion of a building is not controlling as against laborers or materialmen, it has a direct bearing upon the

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<sup>5</sup> Although liability is not admissible to prove whether a person acted negligently or otherwise wrongfully, I.R.E. 401, this title insurance is quite different because the title company that sold the insurance also did the closings and had the responsibility to create documents evidencing that AMERICAN BANK was in a first position.

time when the building was to be completed under the contract, so that the time for filing liens for material and labor would begin to run. The statute provides that this time shall be computed from the date of the last item of material furnished, or from the last work performed. The rule very generally prevails that such time begins to run from the substantial completion of the contract, and that new items thereafter added to the account will not extend the time in which to claim a lien or revive a lien already expired. The more difficult question is to determine when this doctrine the contract has been completed. By the weight of authority, **this is to be ascertained by the conditions of the contract, the conduct of the parties with reference thereto, and the surrounding facts and circumstances.**

129 Idaho 885, 895-896, 934 P.2d 951, 961-962 (1997) (emphasis added).

The contract was conditioned on the successful completion of the entire golf course community. This Court has already found that “Kyle Capps, BRN Development’s Project Manager, testified that the business plan, and the hope of BRN Development, was that the golf course would add value to the Project.” Memorandum Decision, Findings of Fact, Conclusions of Law and Order Following Court Trial.

Furthermore, the Supreme Court of Idaho recently stated a “golf course project is more properly characterized as a single improvement.” *Hopkins Northwest Fund, LLC v. Landscapes Unlimited, LLC*, .... P.3d ....., 2011 WL 5142054, at pg. 7. AAPEX CONSTRUCTION, INC., the predecessor of ACI, entered into a contractual agreement with BRN to aid in the development of the entire golf course community which includes the residences, golf course, and all the infrastructure improvements necessary to enjoy the improvements and to sell lots. All large projects are made up of numerous smaller projects which were represented for accounting reasons by Job Numbers: 06-5040, 06-5035, 06-5040, and 06-5035, or other convenient accounts and documents. AMERICAN BANK goes into great detail in attempting to differentiate ACI’s projects into separate contracts. AMERICAN BANK states that ACI and BRN’s contracts are “separate and distinct.” AMERICAN BANK’s argument is inconsistent with the testimony of



Kyle Capps, the description in AMERICAN BANK's standard credit document, and the holding of the Supreme Court of Idaho in *Hopkins*.<sup>6</sup>

ACI's projects are not separate and distinct. The paper work, even if entitled "contract agreement," "project number," or "invoice" were all one integrated golf course community. All of ACI's projects were part of the BRN golf course and conditioned on the successful completion of the golf course. As a result, all of ACI's projects were inclusive in the BRN development and cannot be singularly parsed out into individual contracts. This was especially true since the design was not completed when the construction started and when "contract agreements" were signed.

ACI's conduct with BRN conforms to the presence of a single endeavor, a project that provided labor and materials. The court in *Mine & Smelter Supply Co. v. Idaho Consol. Mines Co., et al.*, 20 Idaho 300, 118 P. 301 (1911) dealt with a factually similar scenario. The factual situation present within *Mine & Smelter Supply Co.* were "that the various orders were to be used in the building and construction of the mill and other equipment and appliances used in connection therewith, and in the improvement and development of the Minnie Moore mine." *Id.* at 306-307, 118 P. 303. The court concluded that there was "a continuing contract". *Id.*

In determining that a continuing contract was present, the *Mine & Smelter Supply Co.* Court deferred to the Supreme Court of Utah case *Fields v. Daisy Gold Mining Co.*, 25 Utah 76, 69 Pac. 528 (1902) which stated:

In general we consider the proper rule to be that when all the items in the account relate to one continuous transaction between the same parties, although the goods delivered on separate orders, and at different dates, within short intervals of each other, and the dealings of the parties indicate an expectation to continue such business relations, the transactions constitute a continuous running account,

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<sup>6</sup> Wetzel Affidavit 11-15-1; Exhibit "B"; Hendrickson depo. Exhibit 10, AB003245 et seq.

regardless of intervening irregular monthly balances in the account, which dates from the date of the last item delivered, and relates back to the time of the first delivery of material under the course of dealing or contract shown.

Similarly to *Mine & Smelter Supply Co.*, in the present matter, the continuous transaction was the completion of the Black Rock golf course community. At the time of recording the claim of lien, ACI was owed monies on several different parts within the golf course community. The claim of lien amount is prima facie evidence that BRN failed to pay on multiple projects. Furthermore, the outstanding obligation is evidence that BRN treated the so called "separate contracts" as one open continuous account.

The surrounding facts and circumstances support the existence of a single golf course community and that the claim of lien was filed within ninety (90) days of the last date of substantial "completion of the labor or services, or furnishing of materials." Idaho Code § 45-407(2). ACI continued to perform substantial and meaningful work upon the BRN property until March 30, 2009. To determine whether the work performed is substantial or trivial is fact sensitive." *Baker*, 129 Idaho at 896, 934 P.2d at 962. The *Baker* Court determined that the installation of "hardware, bathroom cabinets, base trim and decking" within a home was "not a situation in which materials and services were rendered minimally in an attempt to prolong the filing date of the claim of lien." *Id.* According to ACI's general ledger, ACI employees performed seventy-four (74) work hours in March of 2009. ACI employees were engaged in erosion control on the storm pipe diversion through the winter, even though the heavy snow and BRN's finances diminished the continuing work. Of the seventy-four (74) work hours, sixteen (16) work hours were performed on March 30, 2009. The continuous work of ACI's employees is analogous to the *Baker* case. In the present matter; ACI's employees continued to perform meaningful and substantial work on the BRN storm pipe diversion. Therefore, ACI continued to

provide substantial work on the BRN work site within ninety (90) days of the claim of lien being filed.

Moreover, the factual circumstances depict ACI held itself out as being ready to work with BRN. In *Nelson v. Boise Petroleum Corp.*, the court stated “[t]he time during which respondent held himself in readiness to work for appellant in drilling the well cannot be taken into account in determining when the sixty days within which his lien must be filed commenced to run.” 54 Idaho 179, 32 P.2d 782, 783 (1934); *Blake v. Crystalline Lime Co.*, 37 Idaho 643, 641, 221 P. 1100, 1101 (1923). ACI stayed mobilized at the site, ready and able to recommence as soon as weather and finances allowed. ACI kept its vehicles at the BRN development, until the date the claim of lien was filed. ACI burdened itself with the cost of maintaining its fleet of equipment at the site and at the ready of BRN. As a result, any time spent while ACI held [it]self in readiness to work” “cannot be taken into account in determining when the [ninety] ... days within which [the] ... must be filed ... .” *Id.*

ACI’s claim of lien is valid, because all of the labor and materials related to one continuous project with BRN and, furthermore, because ACI filed its claim of lien within ninety (90) days of completion of substantial work at the BRN development.

## **2. ACI Filed A General Lien Encompassing All Amounts Owed To ACI.**

ACI filed its claim of lien on June 15, 2009 and ACI’s lien is a general lien encompassing all amounts currently owed to ACI from BRN.

According to Idaho § 45-102 “[l]iens are either general or special.”

A general lien is one which the holder thereof is entitled to enforce as a security for the performance of all the obligations, or all of a particular class of obligations, which exist in his favor against the owner of the property

I.C. § 45-103 (emphasis added).

A special lien is one which the holder thereof can enforce only as security for the performance of a particular act or obligation, and of such obligations as may be incidental thereto.

I.C. § 45-104 (emphasis added).

The Idaho Supreme Court recently rendered an applicable decision in the *Hopkins* case. 2011 WL 5142054. In *Hopkins*, Landscapes Unlimited, LLC (hereinafter “LU”) entered into a contract with Hunter’s Point Golf Community (hereinafter “HPGC”) “for the ‘[c]onstruction of all project components for an eighteen hole golf course and practice range.” Pg. 2, WL 5142054. Due to unpaid bills, LU filed a single lien claim “without segregating the amount” for the individual components of the golf course development. *Id.* On appeal, one of the issues being addressed by the Supreme Court of Idaho dealt with whether “I.C. § 45-508 “appl[ies] to LU’s lien such that is failure to designate the amount of its lien as to each parcel results in the lien being postponed to Hopkin’s deeds of trust.” *Id.* at 3. The Supreme Court of Idaho determined that “the project was not known as the thirteen individual components originally identified in the attachment to the agreement, such as mobilization, layout, and erosion control. Rather, the project was known by its singular and final nature, to wit, the Hunter’s Point Golf Course.” *Id.* at 7. The *Hopkins* Court further reasoned that “Hunter’s Point Golf Course is appropriately characterized as a single improvement such that the segregation principles of section 508 would not apply.” *Id.* at 8.

While the Supreme Court of Idaho reviewed the facts in regards to the I.C. 45-508, the decision is applicable to the pending matter, because both *Hopkins* and the present matter deal with whether a claim of lien needs to segregate the amounts owed for the entire project of completing mass excavation and building the infrastructure for a golf course community. In

other words, a lien can be a general lien encompassing all monies owed and does need a claim of lien specifically for each segregate amount even if evidenced by separate “contracts.”

In the matter pending before this Court, the facts are almost identical to the *Hopkins* case. LU and ACI conducted almost exactly the same work on similar golf course developments. To strengthen the similarities, ACI’s claim of lien states “[t]his lien is claimed for monies due and owing to Claimant for various construction work, including but not limited to the construction of streets, golf cart paths, culverts, ditches, swales, wet and dry utilities, along with demolition, excavation, and piping. Moreover, the claim of lien states the duration of time ACI engaged in “related labor and furnishing of the related materials. The time period encompasses “October 1, 2006 and end[ing] on March 17, 2009.” Furthermore, the amount claimed within the claim of lien exceeds the amount owed under “9914 Contract.” The claim of lien language states the lien is for “various” construction work. Merriam-Webster’s Online Dictionary defines “various” as the following: “having a number of different aspects or characteristics” or “of an indefinite number greater than one.” <http://www.merriam-webster.com/dictionary/various>. ACI, through its claim of lien, is asserting its ability to establish a “security for the performance of all the obligations ... which exist in [its] ... favor against the owner of the property.” I.C. § 45-103

Thus applying I.C. 45-103 and the *Hopkin’s* case, ACI’s claim of lien is a general lien encompassing all unpaid work performed by ACI on the BRN property during the above mentioned time period. ACI’s filing of its claim of lien on June 15, 2009 is within the statutorily required timeframe of ninety (90) days, since ACI last completed work on the BRN property on March 30, 2009.

**3. The Payment ACI Received On The Delinquent Account Extended The Deadline To Foreclose On The Claim Of Lien.**

“The purpose of statutory interpretation is to give effect to legislative intent, which starts with the literal words of the statute. The words of the statute are given their plain, usual, and ordinary meaning, unless such meaning leads to absurd results.” *State v. Urrabazo*, 150 Idaho 158, 244 P.3d 1244, 1247 (2010) (internal citations omitted). Idaho’s mechanic’s lien statute is intended to be liberally construed in favor of lien claimants. *Terra-West, Inc., v. Idaho Mutual Trust, LLC.*, 150 Idaho 393, 247 P.3d 620, 624 (2010). The Idaho Supreme Court’s stated policy has been that lien statutes are to be liberally construed “so as to effect their objects and promote justice.” *Id.*, citing, *Metro. Life Ins. Co. v. First Security Bank of Idaho*, 94 Idaho 489, 493, 491 P.2d 1261, 1265 (1971). The purpose of a mechanic’s lien is to provide compensation to people who provide material and/or labor on a construction project. *Pierson v. Sewell*, 97 Idaho 38, 41 (1975). The Idaho Supreme Court has held that “the specific purpose of the claim of lien is to give notice and to provide the contractor with security until he is able to be compensated for his services.” *Barber v. Honorof*, 116 Idaho 767, 769 (1989).

That a payment on a delinquent account extends the deadline for foreclosure of a lien is inarguable. Idaho Code § 45-510 states,

DURATION OF LIEN. No lien provided for in this chapter binds any building, mining claim, improvement or structure for a longer period than six (6) months after the claim has been filed, unless proceedings be commenced in a proper court within that time to enforce such lien; or unless a payment on account is made, or extension of credit given with expiration date thereof, and such payment or credit and expiration date, is endorsed on the record of the lien, then six (6) months after the date of such payment or expiration of extension. The lien of a final judgment obtained on any lien provided for in this chapter shall cease five (5) years from the date the judgment becomes final, but if such period of five (5) years has expired or will expire before September 1, 1947, the owner of such judgment lien shall have until September 1, 1947, within which to levy execution under such judgment.

In *Palmer v. Bradford*, 86 Idaho 395 (1963), the court wrote

We therefore hold that a payment on account made and endorsed on the record of the lien within six months after the claim has been filed does, within the meaning of I.C. §45-510, extend the duration of a lien covered by said statute for a period of six months after such payment.

*Id.* at 401.

ACI filed a claim of lien on June 15, 2009 for the principal amount of \$1,499,827.63 owed for ACI's work on the Black Rock project as well as for interests, costs and attorney's fees pursuant to Idaho Code § 45-513. After ACI's claim of lien, a single payment of \$1000 was made on BRN's account. The plain language of Idaho Code §45-510 is unambiguous; nowhere in the statute does it use the word "contract". The statute provides that any payment made on the delinquent account after endorsement on the record of the lien, serves to extend the duration of the lien for six months. It does not specify an exception to the six month rule based upon the application of a payment to a particular line item on the account that is delinquent. No word within the statute parcels out the lien into portions as opposing counsel suggests. In fact, such narrow interpretation is contrary to the spirit of the mechanic's lien statutes.

The legislature's intent to create broad protections for mechanic's and labor men in creating the mechanic's lien statutes are readily ascertainable from the language of Title 45. Idaho Code §45-101 defines a lien as "a charge imposed... upon specific property by which it is made security for the performance of an act." No mention is made of separate contracts in the statute. Furthermore, Idaho Code §45-102 provides two types of liens, general and specific. A general lien is "one which the holder thereof is entitled to enforce as a security for the performance of all the obligations, or all of a particular class of obligations, which exist in his favor against the owner of the property." Idaho Code §45-103.



ACI's claim of lien stems from its work on the Black Rock project and encompasses all work done on the project. There was a singular claim of lien filed stemming from the work on the Black Rock project and a payment of \$1000 on the account which was applied to the entirety of the lien claim. ACI's time to foreclose on the entirety of the lien was therefore, extended by six months according to Idaho law.

**4. ACI's Lien Is Still Valid Even If It Is Not Verified In The Fashion That AMERICAN BANK Desires**

As has been typical in this motion for partial summary judgment, AMERICAN BANK seems to be grasping at straws for any way to prevent a contractor from being paid for labor and materials provided to the project. In part D of AMERICAN BANK's memorandum, the bank alleges that ACI failed to properly verify its lien under oath. AMERICAN BANK claims that the requirements of Idaho Code § 45-507 have not been met by ACI, so the lien is unenforceable.

What the statute actually requires is that "the claim must be verified by the oath of the claimant, his agent or attorney, to the effect that the affiant believes the same to be just." Ada Loper signed a verification in which she stated: "I know the contents thereof, and I testify that the facts stated therein are true, correct and just based upon my personal knowledge." That is a verification. AMERICAN BANK's hyper-technical argument is certainly not the intent of the Idaho statute or the Idaho Constitution.

On page 18 of the memorandum, AMERICAN BANK claims that the requirements of Idaho Code § 9-1401 were not fulfilled as far as administering of oaths. Yet, when one looks at the wording Ada Loper said "I testify," which certainly should be sufficient for fulfilling the requirements of the lien statute. Although it is true that in Idaho Code § 51-109 a certificate is set forth for a verification, the introductory paragraph states:

(1) Certificates of acknowledgment shall substantially conform to the forms set forth in sections 55-710 through 55-715, Idaho Code. (emphasis added)

It is not necessary that the actual words of the statute be used in order to fulfill the statutory requirements. Idaho Code § 45-507 requires that the claim be filed within 90 days. It further requires: "such claim must be verified by the oath of the claimant, his agent or attorney, to the effect that the affiant believes the same to be just." (emphasis added) The statute does not require the notary use a verification. It requires the claimant or his agent verify. A hyper-technical interpretation may be that the party acknowledging the signature must use the verification which is set forth in Idaho Code § 51-109. However, that is not what the statute states. The form that was used by ACI for this Claim of Lien states first in the actual body of the Claim of Lien, paragraph 10: "All amounts claimed under this lien are fair, just and equitable for the materials that were supplied and/or the labor that was performed. Then, Ada Loper in her signature block again verifies by saying: "I testify that the facts stated therein are true, correct and just based upon my personal knowledge." Then on the Endorsement to Claim of Lien, Ada Loper by similar language again states: "I testify that the facts stated therein are true, correct and just based upon my personal knowledge." That certainly sounds like a verification. Although the Notary did not use a verification, the claimant did verify that the contents were "just." That is all that is required by the statute.

AMERICAN BANK cites the Court to two cases, but neither case supports the position of AMERICAN BANK. The Court of Appeals in *Treasure Valley Plumbing and Heating, Inc. v. Earth Resources Company*, 106 Idaho 920, 922; 684 P.2d. 322, 324 (Idaho App. 1984) states:

A verification is a "[c]onfirmation of correctness, truth, or authenticity, by affidavit, oath or deposition." BLACK'S LAW DICTIONARY 1400 (rev. 5<sup>th</sup> ed. 1979). We hold that these certificates, taken together, constitute a verification. Consequently, they satisfy the requirements of I.C. § 45-507.

The same conclusion should apply to the present case. There is no doubt whatsoever that the word “testify” fulfills the requirements of Black’s Law Dictionary for a verification. In fact, testify in Black’s Law Dictionary (rev 4<sup>th</sup> ed.) is defined as:

TESTIFY. To bear witness; to give evidence as a witness; to make a solemn declaration, under oath or affirmation, in a judicial inquiry, for the purpose of establishing or proving some fact.

The other case cited is *Cornerstone Builders, Inc. v. McReynolds*, 136 Idaho 843, 41 P.3d 271 (Court of Appeals 2002). In *Cornerstone*, the Court of Appeals did hold that a particular claim of lien failed to fulfill the requirements of I.C. § 45-507. But the court states: “The claims of lien in this case do not contain any verification even remotely similar to that in *Treasure Valley*.” The court goes on to distinguish *Treasure Valley* stating:

The claim in *Treasure Valley* specifically included a verification, executed by the president of the corporation, stating that he believed the contents of the lien to be *true and just*.

The same distinction applies to the present case versus the facts of *Cornerstone*. In the present case, Ada Loper, Certified Public Accountant and a secretary treasurer of ACI, states that “I testify.” She also goes on to say that its “based upon my personal knowledge.” Testimony under personal knowledge certainly appears to be an affidavit and sworn testimony. Based upon this sworn testimony, Ada Loper says “the facts stated therein are true, correct and just. . .” A verification does exist under the requirements of *Cornerstone* and *Treasure Valley*.

In the case of *Terra-West, Inc. v. Idaho Mut. Trust, LLC*, 150 Idaho 393, 247 P.3d 620 (Idaho 2010), the Supreme Court has discussed a similar situation. The court in *Terra-West* states:

Because Idaho’s mechanic’s lien statute is constitutionally mandated (IDAHO. CONST., art. XIII, § 6) and intended to be liberally construed in favor of lien claimants (*Pierson v. Sewell*, 97 Idaho 38, 41, 539 P.2d 590, 593 (1975)), it is

doubtful that additional procedural hurdles suggested by Idaho Mutual were intended by the Legislature.

This same conclusion should apply to what is attempted by AMERICAN BANK. AMERICAN BANK attempts to force a hyper-technical argument in order to avoid a constitutionally mandated right of workers to be paid for their labor and materials.

### CONCLUSION

The law is clear, and the facts are equally clear. ACI's lien rights are to be protected. Protection of the providers of labor and materials is mandated by Idaho law.

DATED this 16<sup>th</sup> day of November, 2011.

**JAMES, VERNON & WEEKS, PA**

By: 

Steven C. Wetzel

Attorneys for Defendant ACI NORTHWEST, INC.

### CERTIFICATE OF MAILING AND/OR DELIVERY

I hereby certify that on the 16<sup>th</sup> day of November, 2011, I served the foregoing document upon:

☐ U.S. Mail, Postage Prepaid

☐ Hand Delivered

☐ Overnight Mail

☐ Facsimile: 509-838-1416

☒ jk@winstoncashatt.com

☒ nisserlis@winstoncashatt.com

☒ etellessen@winstoncashatt.com

Nancy L. Isserlis

Elizabeth A. Tellessen

Winston & Cashatt

250 Northwest Blvd., Suite 107A

Coeur d'Alene, ID 83814

*Attorneys for American Bank*

\_\_\_\_ U.S. Mail, Postage Prepaid  
\_\_\_\_ Hand Delivered  
\_\_\_\_ Overnight Mail  
\_\_\_\_ Facsimile: 208-385-5384

X rap@moffatt.com  
X cc@moffatt.com

Randall A. Peterman  
C. Clayton Gill  
Moffatt Thomas Barrett Rock &  
Fields, Chtd.  
101 South Capitol Blvd., 10<sup>th</sup> Floor  
P.O. Box 829  
Boise, ID 83701-0829

*Attorneys for American Bank*

\_\_\_\_ U.S. Mail, Postage Prepaid  
\_\_\_\_ Hand Delivered  
\_\_\_\_ Overnight Mail  
X Facsimile: 208-773-1044

Charles B. Lempesis  
Attorney at Law  
201 West Seventh Avenue  
Post Falls, ID 83854

*Attorneys for Thorco, Inc.*

\_\_\_\_ U.S. Mail, Postage Prepaid  
\_\_\_\_ Hand Delivered  
\_\_\_\_ Overnight Mail  
X Facsimile: 208-667-8470

Edward J. Anson  
Witherspoon Kelley Davenport &  
Toole  
608 Northwest Blvd., Suite 300  
Coeur d'Alene, ID 83814-2146

*Attorneys for The Turf Corporation,  
Wadsworth Golf Construction  
Company and Precision Irrigation,  
Inc.*

\_\_\_\_ U.S. Mail, Postage Prepaid  
\_\_\_\_ Hand Delivered  
\_\_\_\_ Overnight Mail  
X Facsimile: 509-455-7111  
pmadrigal@campbell-bissell.com  
rcampbell@cbklawyers.com

Richard D. Campbell  
Campbell Bissell & Kirby, PLLC  
416 Symons, Building 7  
South Howard Street  
Spokane, WA 99201-3816

*Attorneys for Polin & Young  
Construction*

\_\_\_\_ U.S. Mail, Postage Prepaid  
\_\_\_\_ Hand Delivered  
\_\_\_\_ Overnight Mail  
\_\_\_\_ X Facsimile: 667-8470

M. Gregory Embrey  
Witherspoon Kelley Davenport &  
Toole  
422 W Riverside Ave., Suite 1100  
Spokane, WA 99201

*Attorneys for Taylor Engineering, Inc.*

\_\_\_\_ U.S. Mail, Postage Prepaid  
\_\_\_\_ Hand Delivered  
\_\_\_\_ Overnight Mail  
\_\_\_\_ K Facsimile: 509-624-2902  
wahonen@lamanlawfirm.com  
jrlayman@laymanlawfirm.com

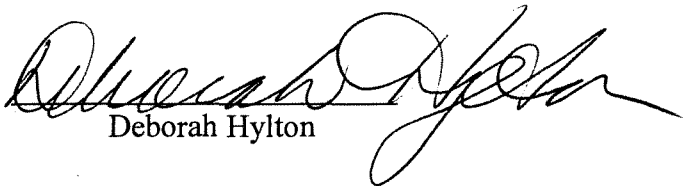
John R. Layman  
Layman Layman & Robinson, PLLP  
5431 N Government Way, Suite 101A  
Coeur d'Alene, ID 83815

*Attorneys for BRN Development, Inc.,  
BRN Investments, LLC, Lake View AG,  
BRN-Lake View Joint Venture, The  
Roland M. Casati Family Trust, Dated  
June 5, 2008*

\_\_\_\_ U.S. Mail, Postage Prepaid  
\_\_\_\_ Hand Delivered  
\_\_\_\_ Overnight Mail  
\_\_\_\_ K Facsimile: 208-664-5884  
firm@ramsdenlyons.com

Douglas S. Marfice  
Ramsden & Lyons, LLP  
700 Northwest Blvd.  
P.O. Box 1336  
Coeur d'Alene, ID 83816-1336

*Attorneys for Ryker Young Revocable  
Trust*

  
Deborah Hylton

Randall A. Peterman, ISB No. 1944  
 C. Clayton Gill, ISB No. 4973  
 Tyler J. Anderson, ISB No. 6632  
 MOFFATT, THOMAS, BARRETT, ROCK &  
 FIELDS, CHARTERED  
 101 S. Capitol Blvd., 10th Floor  
 Post Office Box 829  
 Boise, Idaho 83701  
 Telephone (208) 345-2000  
 Facsimile (208) 385-5384  
 rap@moffatt.com  
 ceg@moffatt.com  
 tya@moffatt.com  
 23690.0022

Nancy L. Isserlis, ISB No. 7331  
 Elizabeth A. Tellessen, ISB No. 7393  
 WINSTON & CASHATT  
 250 Northwest Blvd., Suite 107A  
 Coeur d'Alene, Idaho 83814  
 Telephone (509) 838-6131  
 Facsimile (509) 838-1416

Attorneys for Plaintiff

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT  
 OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

AMERICAN BANK, a Montana banking  
 corporation.

Plaintiff,

vs.

BRN DEVELOPMENT, INC., an Idaho  
 corporation, BRN INVESTMENTS, LLC, an  
 Idaho limited liability company, LAKE VIEW  
 AG, a Liechtenstein company, BRN-LAKE  
 VIEW JOINT VENTURE, an Idaho general  
 partnership, ROBERT LEVIN, Trustee for the  
 ROLAND M. CASATI FAMILY TRUST,  
 dated June 5, 2008, RYKER YOUNG, Trustee  
 for the RYKER YOUNG REVOCABLE  
 TRUST, MARSHALL CHESROWN a single

Case No. CV 09-2619

AMERICAN BANK'S MEMORANDUM  
 IN OPPOSITION TO ACI'S MOTION  
 FOR SUMMARY JUDGMENT

STATE OF IDAHO  
 COUNTY OF KOOTENAI } SS  
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man. IDAHO ROOFING SPECIALIST, LLC, an Idaho limited liability company, THORCO, INC., an Idaho corporation, CONSOLIDATED SUPPLY COMPANY, an Oregon corporation, INTERSTATE CONCRETE & ASPHALT COMPANY, an Idaho corporation, CONCRETE FINISHING, INC., an Arizona corporation, THE TURF CORPORATION, an Idaho corporation, WADSWORTH GOLF CONSTRUCTION COMPANY OF THE SOUTHWEST, a Delaware corporation, POLIN & YOUNG CONSTRUCTION, INC., an Idaho corporation, TAYLOR ENGINEERING, INC., a Washington corporation, PRECISION IRRIGATION, INC., an Arizona corporation and SPOKANE WILBERT VAULT CO., a Washington corporation, d/b/a WILBERT PRECAST,

Defendants.

Cross-Defendant American Bank ("American Bank") hereby submits the following memorandum in opposition to Cross-Claimant ACI Northwest, Inc.'s ("ACI") motion for summary judgment filed on November 3, 2011.

## **I. INTRODUCTION**

ACI moves for summary judgment, claiming that the validity and amount of its claim of lien is not in dispute. This Court should deny ACI's motion because there are many disputes relating to the validity and amount of ACI's claim of lien.

ACI's claim of lien is not valid because: (1) ACI recorded its claim of lien too late; (2) ACI filed its action to foreclose its claim of lien too late; (3) ACI failed to verify its lien under oath; (4) ACI used a subcontractor that was not registered under Idaho's Contractor Registration Act; and (5) ACI failed to apportion or limit its lien to the property that it actually improved.



These are the disputes relating to the amount of ACI's claim of lien: (1) ACI waived its right to lien for the cost savings incentive bonus; (2) there are genuine issues of material fact as to whether ACI is owed anything for the cost savings incentive component of its claim of lien; and (3) ACI waived its right to lien for the retainage that it is seeking to recover through the foreclosure of its claim of lien.

For the reasons set forth in more detail below, this Court should deny ACI's motion for summary judgment on the validity and amount of its claim of lien.

## II. ARGUMENT

### A. ACI's Lien Is Not Valid.

ACI seeks summary judgment claiming there is no dispute that its claim of lien is valid. ACI's motion should be denied at the outset because there are at least five (5) different reasons why ACI's lien is not valid.

#### 1. ACI's lien is not valid because ACI filed its claim of lien too late.

American Bank incorporates by reference all of its arguments raised in its motion for summary judgment filed on November 3, 2011, wherein American Bank argues that ACI's claim of lien is invalid because: (1) ACI filed its claim of lien too late for the 12 contracts encompassing its claim of lien; and (2) ACI never filed a claim of lien with respect to the 9914 Contract.<sup>1</sup> See American Bank's Memorandum in Support of Motion for Summary

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<sup>1</sup> Even if the work performed under the 9914 Contract could extend ACI's deadline to record its claim of lien for all work ACI performed on the Project, which it cannot, there is a genuine issue of material fact as to whether ACI was ever authorized to perform any work on the project in 2009, let alone under the 9914 Contract. See Affidavit of Kyle Capps filed November 4, 2011.

Judgment on Invalidity of ACI Northwest, Inc.'s Claim of Lien (Count Three of ACI's Cross-Claims) at 5-15.<sup>2</sup>

**2. ACI's lien is not valid because ACI filed its action to foreclose its claim of lien too late.**

American Bank incorporates by reference all of its arguments raised in its motion for summary judgment filed on November 3, 2011, wherein American Bank argues that ACI filed its action to foreclose its claim of lien too late because the \$1,000 payment that ACI received in December of 2009 only extended the deadline to file an action to foreclose the claim of lien for the 8964 Contract, but not the other 11 contracts encompassing ACI's claim of lien. *See American Bank's Memorandum in Support of Motion for Summary Judgment on Invalidity of ACI Northwest, Inc.'s Claim of Lien (Count Three of ACI's Cross-Claims) at 16-17.*

**3. ACI's lien is not valid because ACI failed to verify its lien under oath.**

American Bank incorporates by reference all of its arguments raised in its motion for summary judgment filed on November 3, 2011, wherein American Bank argues that ACI's claim of lien is not valid because it was not verified under oath as required by Idaho Code Section 45-507(4). *See American Bank's Memorandum in Support of Motion for Summary Judgment on Invalidity of ACI Northwest, Inc.'s Claim of Lien (Count Three of ACI's Cross-Claims) at 17-20.*

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<sup>2</sup> The affidavit of Douglas Foster submitted by ACI in support of its motion for summary judgment confirms that ACI entered into at least 13 different contracts with BRN, each with different scopes of work. *See Affidavit of Douglas Foster in Support of ACI Northwest, Inc.'s Motion for Partial Summary Judgment* ¶¶ 9.1 - 9.14. Likewise, the deposition testimony of BRN representative Kyle Capps also confirms that ACI and BRN entered into multiple contracts, each with different scopes of work. *See Deposition of Kyle Capps* 291:10-22, attached as Ex. A to the Affidavit of Steven C. Wetzel in Support of ACI Northwest, Inc.'s Motion for Partial Summary Judgment.

**4. ACI's lien is not valid because ACI used a subcontractor that was not registered under Idaho's Contractor Registration Act.**

ACI hired North Idaho Drilling, Inc. as a subcontractor to assist ACI in completing its work on the Project. *See* American Bank's Statement of Facts in Opposition to ACI's Motion for Summary Judgment ("Opposition SOF") at ¶ 8. However, North Idaho Drilling was not registered as a contractor under Idaho's Contractor Registration Act (*see* Idaho Code Section 54-5201, *et seq.*, hereinafter referred to as the "Act" or "Contractor Act") at the time it performed work on the Project. *See* Opposition SOF at ¶¶ 9-11. Rather, the records from the Bureau of Occupational Licenses show that North Idaho Drilling did not register as a contractor until October 13, 2009, i.e., after it performed work on the Project.<sup>1</sup> *See* Ex. H to Affidavit of C. Clayton Gill in Opposition to ACI's Motion for Summary Judgment ("2nd Gill Aff."). Further, ACI's business records produced in this action show that: (1) North Idaho Drilling billed ACI for \$45,454.59 for work North Idaho Drilling performed on the Project during the year 2007 and that ACI applied such amounts to its Contract 6416 with BRN; (2) ACI paid North Idaho Drilling \$44,116.12 for its work performed under Contract 6416; and (3) there is a balance owing of \$1,338.47 to North Idaho Drilling under Contract 6416. *See* Opposition SOF at ¶¶ 12-14. Additionally, ACI's business records produced in this action show that: (1) North Idaho Drilling billed ACI for \$229,558.62 for work performed on the Project during the year 2008 and that ACI applied this amount to Contract 8101; (2) ACI paid North Idaho

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<sup>1</sup> The terms Project, Contract 6416, and the other similar capitalized terms are defined by American Bank either in American Bank's Statement of Undisputed Facts in Support of American Bank's Motion for Summary Judgment Against ACI Northwest, Inc. on Invalidity of ACI's Claim of Lien (Count Three of ACI's cross-claim), filed on November 3, 2011 (hereinafter "American Bank's MSJ SOF"), or in American Bank's Statement of Facts in Opposition to ACI's Motion for Summary Judgment ("Opposition SOF").

Drilling \$151,784.88 for its work performed under Contract 8101; and (3) there is a balance owing of \$77,773.74 under Contract 8101. See Opposition SOF at ¶¶ 15-17.

The question presented is what legal consequences flow from ACI's use of an unregistered subcontractor on this Project. The starting point for this question is Idaho Code Section 54-5204(2), which provides:

It shall be unlawful for a contractor to engage any other contractor who is required by this chapter to be registered as a contractor unless such other contractor furnishes satisfactory proof to the contractor that he is duly registered under the provisions of this chapter.

The critical words at issue in Section 54-5204(2) are the phrase "satisfactory proof." This Court has previously interpreted that phrase in 54-5204(2) as requiring proof that the contractor obtained a registration certificate from the subcontractor, or a wallet-size registration card, obtained proof from an online search of the website maintained by the Idaho Bureau of Occupational Licenses, or otherwise obtained other proof of registration from the Idaho Bureau of Occupational Licenses. See Memorandum Decision, Findings of Fact, Conclusions of Law and Order Following Court Trial, filed August 22, 2011 ("Wadsworth Verdict") at 22-23. ACI offers no such proof in this action. Thus, ACI engaged in unlawful activity by failing to obtain "satisfactory proof" of North Idaho Drilling's registration under Idaho's Contractor Registration Act.

The next question is what consequences flow from ACI's unlawful activity. Ada County District Judge Michael Wetherell recently addressed this very issue in *Prowall Drywall & Insulation, Inc. v. Plainridge*, holding the Act invalidated a contractor's entire lien because of its use of an unregistered subcontractor. In so holding, Judge Wetherell relied upon the language of Idaho Code Sections 54-5208 (which waives lien rights for failing to register as required by

the Act) and 54-5217 (which bars an unregistered subcontractor from bringing an action in an Idaho court).

Whether Sections 5208 and 5217 apply to the hiring of unregistered subcontractors is an issue of first impression.

\* \* \*

As to the issue of whether Sections 5208 and 5217 apply to registered contractors that engage unregistered subcontractors, this Court finds that they do apply. The first sentence of Section 5208, if read in a vacuum, would apparently operate to deny lien rights only to unregistered contractors, and thus all registered contractors would have lien rights. However, that interpretation would render meaningless other parts of the statute. The most glaring is the first clause of the second sentence in the statute, which states that the statute will not operate to deny the rights of registered contractors operating at the direction of unregistered contractors. If the first sentence were to strictly apply only to unregistered contractors themselves, that clause would be utterly without meaning, as it only guarantees that lien rights will not be denied to a subset of registered contractors, which would not have their rights denied anyway.

The second part of Chapter 52 that would be rendered virtually meaningless would be proscription of hiring unregistered contractors. Section 5204 specifically makes it unlawful to engage a subcontractor without receiving proof that the subcontractor was registered. If there were no penalties applied for violating that provision, it would render "unlawful" virtually meaningless. This Court must apply the law in such a way as to give effect to all statutory provisions. If this Court were to decline to apply the penalty provision to registered contractors who hire unregistered contractors, it would render several provisions of this statute meaningless. Thus, this Court finds that penalties of Sections 5208 and 5217 apply to registered contractors that engage unregistered contractors.

\* \* \*

Since the penalties of Chapter 52 apply to registered contractors that hire unregistered subcontractors, any lien claims arising while the unregistered subcontractor is employed are conclusively waived, and no action may be brought for collection of debts owed on the labor. Since there is no disagreement that Rancho was unregistered throughout all the work performed by Prowall on the

Plainridge Place Condominiums. Prowall's lien claims and action to collect are barred.

*See* Memorandum Decision and Order Re: Wells Fargo's Motion for Summary Judgment Against Prowall Drywall & Insulation, Inc., dated February 2, 2011, attached as Ex. A to American Bank's proposed Findings of Fact and Conclusions of Law, filed on April 25, 2011, at 5-7.

This Court should adopt the reasoning of Judge Wetherell, giving meaning and effect to the language of Idaho Code Section 54-5204(2) that made it unlawful for ACI to engage unregistered subcontractors on this job. Alternatively, as the court did with the Wadsworth claim of lien, this Court should reduce the amount of ACI's claim of lien by the amount that ACI owes to North Idaho Drilling, which amount, according to ACI's business records, is \$79,112.21. *See* Opposition SOF at ¶¶ 14 and 17; *see* Wadsworth Verdict at 23 ("The more equitable remedy is to reduce the lien by the amount of unpaid invoices owing to the unregistered subcontractors.").

**5. ACI's lien is not valid because it failed to apportion its claim of lien to the property it actually improved.**

ACI admits that it filed its lien against the entire Project, rather than just the property that it physically improved. *See* Opposition SOF at ¶ 20. Put another way, ACI failed to limit its lien against the various different parcels it improved under the 12 different contracts that encompass ACI's claim of lien, i.e., ACI performed work under separate contracts on different parcels, but filed its claim of lien for each of those 12 separate contracts against the entire Project. *See* Opposition SOF at ¶¶ 18-21.

Because ACI failed to limit its lien to the portion of property it improved and the contractual amount owing for each separate contract, this Court should invalidate ACI's claim of lien, in whole or in part, for failing to comply with Idaho Code Section 45-508, which states: "In

every case in which one (1) claim is filed against two (2) or more . . . improvements, owned by the same person, the person filing such claim must, at the same time, designate the amount due him on each of said . . . improvement . . . .”

**B. There Are Genuine Issues of Material Facts Regarding the Amount of ACI's Claim of Lien.**

ACI asserts that there are no genuine issues of material fact that the amount of ACI's claim of lien is at least \$1,190,691.60. ACI's motion with respect to the amount of its claim of lien should be denied because ACI waived its right to lien for amounts included within ACI's claim of lien and there are genuine issues of material fact as to whether ACI is entitled to a cost savings incentive bonus in the first instance.

**1. ACI waived its right to lien for the cost savings bonus it is claiming under the 6416 Contract.**

ACI's claim of lien includes an amount identified as \$1,045,752.57 for “Bonus Per Contract for Cost Savings.” See Opposition SOF at ¶ 35. ACI seeks to recover this cost savings incentive component through the foreclosure of its claim of lien. ACI claims the cost savings component is owed pursuant to the terms of Contract 6416 and further admits that it last provided labor, services, equipment, and materials to the Project under Contract 6416 on May 15, 2008, i.e., prior to June 11, 2008. See Opposition SOF at ¶¶ 28 and 30. This Court should deny ACI's attempt to recover the cost savings component in this lien foreclosure action because in the last Golden Release that ACI signed for the 6416 Contract, ACI expressly and unconditionally waived its lien rights for any further amounts owing for any labor, services, equipment or materials it supplied to the Project under Contract 6416 prior to June 11, 2008.<sup>4</sup>

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<sup>4</sup> American Bank is arguing that ACI waived its right to lien for any amount owing for the costs savings incentive component owing under Contract 6416. American Bank is not arguing that ACI waived all rights to recover the costs savings incentive component from BRN.

See Opposition SOF at ¶ 29. Of note, ACI's internal accounting records show that ACI billed BRN for a total of \$6,608,243.90 for Contract 6416 and received payments of \$6,608,243.90 from BRN, leaving a zero balance owing from BRN on Contract 6416. See Opposition SOF at ¶¶ 40-41.

More specifically, on July 24, 2008, ACI executed and delivered to BRN a document entitled, "FINAL UNCONDITIONAL LIEN WAIVER, RELEASE AND SUBORDINATION." See Opposition SOF at ¶ 29. That document identifies the term "Project" on the reference line of the document as follows: "PROJECT -- 6416 -- Black Rock North Golf Course." See Ex. V to 2nd Gill Aff. at BRD006493 and BRD006495. Then, in the text of the document, ACI unconditionally waived its right to lien for any further amount owing under the 6416 Contract, specifically stating:

The undersigned hereby acknowledges receipt of \$297,631.59, check number 2751, dated July 24, 2008, as full and final payment for any and all work or labor performed, materials, equipment, goods, or things supplied or furnished, or any other claims or obligation owed through the date shown above [6/11/08], on the above-named Project, and the undersigned hereby waives any and all right to any lien whatsoever and releases all rights to lien or claim any lien against the real property associated with the above Project in connection with any and all work or labor performed, materials, equipment, goods or things supplied or furnished, or any other claims or obligations owed through the date shown above [6/11/08], on the above-named Project.

*Id.* The lien waiver quoted above was signed by Roberta Bagley, senior vice-president for ACI.

*Id.* In Ms. Bagley's recently-filed affidavit, she admits that a similar lien waiver waived ACI's lien rights, although she disputes that it subordinated ACI's lien to American Bank's mortgage.

See Affidavit of Berta Bagley in Support of Motion for Partial Summary Judgment ¶ 4 ("... it

nor is there anything in the Golden Release to suggest that ACI has waived that contractual claim against BRN.



was my understanding that the document was a release of lien for services and materials provided, which is the traditional requirement for payment on a progress payment on a construction project.”).

In sum, ACI knowingly, voluntarily, and unconditionally waived all of its lien rights for any labor, services, equipment, or materials provided to the Project under Contract 6416 prior to June 11, 2008. Further, ACI admits that it last supplied labor, services, equipment, and materials to the Project under Contract 6416 on May 15, 2008. See Opposition SOF at ¶ 28. Thus, applying the plain meaning of the words used in the aforementioned lien waiver, this Court should deny ACI’s lien foreclosure claim to the extent it seeks to recover any remaining amounts owing under Contract 6416, including the \$1,045,752.57 that ACI claims is owing as “Bonus Per Contract for Cost Savings” under Contract 6416. *Baker v. Boren*, 129 Idaho 885, 896, 934 P.2d 951 (Cl. App. 1997) (enforcing similar lien waiver to prevent recovery of monies owed in lien foreclosure action for work performed prior to the execution of the lien waiver); *Pierson v. Sewell*, 97 Idaho 38, 42-43, 539 P.2d 590 (1975).

It is anticipated that ACI will argue that: (1) the aforementioned Golden Release was not supported by consideration; and (2) American Bank lacks standing to enforce the aforementioned Golden Release. Each of those anticipated arguments will be addressed below. In the end, the undisputed evidence establishes that ACI received sufficient consideration to make the Golden Release enforceable. Further, the undisputed evidence establishes that American Bank has standing to enforce the Golden Release as a competing lien claimant and as a third-party beneficiary.

a. **ACI received consideration for the Golden Release it executed.**

ACI suggests that it did not receive consideration for the Golden Release it signed. Nothing could be further from the truth. ACI agreed as part of its bilateral contract with BRN to execute Golden Releases, and in return, BRN agreed to pay ACI on a periodic basis. See Opposition SOF at ¶¶ 23-25. More specifically, ACI's contract with BRN states: "[a]s a prerequisite for any payment, [ACI] shall provide, in a form satisfactory to [BRN], partial lien releases, claim waivers, and affidavits of payment from [ACI], and its subcontractors and suppliers of any tier, for the billed portion of Subcontractor's work." See Opposition SOF at ¶ 23. Then, on the signature page of the contract, it states, "[t]he following Exhibits are attached and incorporated by reference: . . . 'B', Interim Lien/Claim Waiver." See Opposition SOF at ¶ 24. At the Rule 30(b)(6) deposition of ACI, ACI admitted that the Golden Release form was attached as Exhibit "B" to each of the five written contracts between ACI and BRN, and then after each contract was executed, ACI removed the Golden Release form and placed it in ACI's billing file for use with each payment application ACI submitted to BRN. See Opposition SOF at ¶ 25. Many of the Golden Releases executed by ACI also contain the notation of Exhibit "B" at the top of document, further reflecting that this was, in fact, the Exhibit "B" attached to ACI's written contracts with BRN, including Contract 6416. E.g., see Ex. U to 2nd Gill Aff.

In sum, because ACI contractually agreed to use the Golden Release form and because ACI received the payment referenced in the Golden Release in question, ACI received sufficient consideration to make the Golden Release binding and enforceable. *Enders v. Wesley W. Hubbard & Sons, Inc.*, 95 Idaho 590, 593, 513 P.2d 992, 995 (1973) ("It is fundamental contract law that when entering into a bilateral contract, such as the lease extension agreement, a promise for a promise is sufficient legal consideration."); see also Wadsworth

Verdict at 34 ("Consideration was also provided by Wadsworth contractually agreeing to use the Golden Releases as part of its bilateral contract with BRN.").

**b. American Bank, as a competing lien claimant, has the right to enforce the lien waivers executed by ACI.**

American Bank, as a competing lienholder creditor to the *res* or property that is the subject of this foreclosure action, has the right to contest the validity and amount of ACI's claim of lien. Put another way, ACI has two options to recover any unpaid amount owing for the cost savings incentive because: (1) an action to recover its debt against BRN, the party it contracted with, outside the lien foreclosure statute (IDAHO CODE § 45-515); or (2) an action to recover under the lien foreclosure statute (IDAHO CODE § 45-501, *et seq.*). By this motion for summary judgment, ACI is proceeding under the second option, i.e., to foreclose its lien, which is an *in rem* action. *Franklin Bldg. Supply Co. v. Sumpter*, 139 Idaho 846, 850, 87 P.3d 955, 959 (2004) (quoting *Pierson v. Sewell*, 97 Idaho 38, 44, 539 P.2d 590, 596 (1975) ("Lien foreclosures under Idaho Code Section 45-501, *et seq.*, are strictly actions *in rem* and are not *in personam* proceedings: "The lien statute operates *in rem*, and not *in personam*. It creates no personal charge against the owner of the property, but rather a charge against the property to the extent of its value.")). Because ACI is choosing to collect its debt from the *res*, American Bank, as a competing mortgage lienholder creditor to the same *res*, has the right to contest the validity and amount of ACI's claim of lien.

Further, black-letter Idaho law supports American Bank's assertion that, regardless of its status as a third-party beneficiary, it has the right to contest the validity and amount of ACI's claim of lien, including binding ACI to the terms of the Golden Releases. First, Idaho's mechanic lien statutes give American Bank standing as follows: "[a]ny number of persons claiming liens against the same property may join in the same action . . . ." See IDAHO

CODE § 45-513. Likewise, Idaho's mortgage foreclosure statute gives American Bank standing to contest the validity and amount of ACI's lien.

In any suit brought to foreclose a mortgage or lien upon real property or a lien on or security interest in personal property, the plaintiff, cross-complainant or plaintiff in intervention may make as party defendant in the same cause of action, any person having, claiming or appearing to have or to claim any title, estate, or interest in or to any part of the real or personal property involved therein, and the court shall, in addition to granting relief in the foreclosure action, determine the title, estate or interest of all parties thereto in the same manner and to the same extent and effect as in the action to quiet title.

See IDAHO CODE § 45-1302.

As for the amount of ACI's claim of lien, Idaho's mechanic lien statutes expressly provide that the Court must limit such lien to the amount ACI is entitled to recover "according to the terms of his contract." IDAHO CODE § 45-511 ("The original or subcontractor shall be entitled to recover, upon the claim filed by him, only such amount as may be due to him according to the terms of his contract . . .") (emphasis added); *Steltz v. Armory Co.*, 15 Idaho 551, 99 P. 98, 101 (1915) ("Of course the extent of the lien when he comes to foreclose it must be measured by the amount found due him on his contract at the time of filing his lien."). Thus, applying Idaho's mechanic lien statutes and Idaho's mortgage foreclosure statute, American Bank has the right to contest both the validity and amount of Wadsworth's claim of lien, and as part of such foreclosure proceeding, bind ACI to its contractual obligation to use the Golden Releases. See Wadsworth Verdict at 29 ("Thus, applying Idaho's mechanic lien statutes and Idaho's mortgage foreclosure statutes, American Bank may contest both the validity and amount of Wadsworth's claim of lien -- as part of such foreclosure proceeding and bind Wadsworth to its contractual obligation to use the Golden Releases.").

c. **American Bank is a third-party beneficiary to the lien waivers executed by ACI.**

Assuming, *arguendo*, that Idaho's mechanic lien statutes and mortgage foreclosure statute do not give American Bank an independent ground to assert standing to bind ACI to the Golden Releases, it is still clear that American Bank qualifies as a third-party beneficiary of ACI's contract with BRN. The test for determining a party's status as a third-party beneficiary is whether the agreement reflects an intent to benefit the third party. *See* IDAHO CODE § 29-102; *Partout v. Harper*, 145 Idaho 683, 687, 183 P.3d 771, 775 (2008). Further, the Idaho Supreme Court has enumerated a variety of factors to be considered by the Court when determining if a party is a third-party beneficiary.

In order to recover as a third party beneficiary, it is not necessary that the individual be named and identified as an individual although that is usually sufficient; a third party may enforce a contract if he can show he is a member of a limited class for whose benefit it was made. The class may be limited either by a narrow description of the injuries to be guarded against and the damages to be paid, or by a similar description of the class to be protected.

*Just's, Inc. v. Arrington Constr. Co.*, 99 Idaho 462, 464, 583 P.2d 997, 999 (1978) (quoting *Stewart v. Arrington Constr. Co.*, 92 Idaho 526, 532, 446 P.2d 895, 901 (1968)).

As was established at the 30(b)(6) deposition of ACI, the Golden Release form was incorporated by reference into Wadsworth's contract with BRN. *See* Opposition SOF at ¶¶ 23-25. Further, ACI's contract with BRN required ACI to submit a Golden Release with each payment application it submitted to BRN, and ACI did in fact submit Golden Releases to BRN with the payment applications it submitted for the five written contracts included within ACI's claim of lien. *See* Opposition SOF at ¶¶ 23-26.

While the language of the Golden Release form does not expressly identify American Bank, it does reflect a waiver or modification of lien rights that is expressly intended

to benefit other lienholders. More specifically, the Golden Release form states, "upon receipt of the payment stated above, the undersigned agrees that any lien that may be filed for work performed after said date will only have lien priority from and after the date stated above and will be subordinate to *any liens or encumbrances attaching to the subject property prior to said date.*" See Opposition SOF at ¶ 48. Pursuant to that language, ACI was agreeing to subordinate its lien priority date to other third-party liens that attached to the property prior to the date inserted in the Golden Release. And the other language in the Golden Release that waives all lien rights for "all work or labor performed, materials, equipment, goods, or things supplied or furnished, or any other claims or obligations owed through the date shown above," is consistent with the aforementioned subordination clause. See Opposition SOF at ¶ 48. The waiver language is consistent because it ensures that ACI cannot lien for work prior to the date inserted in each Golden Release and, thus, cannot claim priority to any lien or encumbrance attaching to the property prior to the date inserted in the Golden Release.<sup>9</sup>

Finally, the Golden Release by its express terms included such subordination and waiver terms for the express benefit of "any liens or encumbrances attaching to the subject property prior to said date," which would include American Bank's mortgage lien. And while BRN on the one hand entered into a construction contract with ACI that required the use of the Golden Release, BRN on the other hand entered into a written loan contract with American Bank that (1) granted American Bank a first priority mortgage lien against the property upon which ACI was making improvements, and (2) required BRN to certify that it had obtained a lien

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<sup>9</sup> Without this subordination and waiver language, ACI would undoubtedly rely upon other Idaho law to assert that its lien priority relates back to the date it first supplied labor, services, materials, or equipment to the project. See ACI's Memorandum in Support of ACI Northwest, Inc.'s Motion for Partial Summary Judgment.

waiver from its contractors like ACI, as BRN paid such contractors with the loan proceeds advanced by American Bank. See Opposition SOF at ¶¶ 49-51.<sup>6</sup>

Applying *Just*'s criteria for third-party beneficiary status to the facts at hand, American Bank is a third-party beneficiary because the aforementioned language of the Golden Release (1) gives a narrow description of the injuries to be guarded against and the damages to be paid and (2) identifies the limited class for whose benefit it is made. See Wadsworth Verdict at 33 ("Applying *Just*'s criteria for third party beneficiary status to the facts at hand, American Bank is a third party beneficiary because the aforementioned language of the Golden Release (1) gives a narrow description of the injuries to be guarded against and the damages to be paid and (2) identifies the limited class for whose benefit it is made.").

**2. There are genuine issues of material fact as to whether BRN owes ACI anything under the cost savings incentive component to the 6416 Contract.**

In its claim of lien, ACI asserted the amount owing for the costs savings incentive bonus is \$1,045,752.57. See Opposition SOF at ¶ 35. At the Rule 30(b)(6) deposition of ACI taken on March 8, 2011, ACI asserted that the amount owing for the costs savings incentive bonus is \$1,130,711.31. See Opposition SOF at ¶ 36. Now, in its recently-filed motion for summary judgment, ACI asserts that the amount owing for the costs savings incentive bonus is \$736,781.75. See Opposition SOF at ¶ 37. Notwithstanding ACI's own difficulty in calculating what it believes is owing as a costs savings incentive under the 6416 Contract, ACI asserts there is no genuine issue of material fact that at least \$736,781.75 is owing for the costs savings incentive bonus. In making this argument, ACI wants this Court to turn a blind eye to the

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<sup>6</sup> The payments advanced by American Bank to BRN gave BRN the funds to pay ACI. Thus, American Bank's loan to ACI benefited ACI by giving BRN a source of funds to pay ACI.

following facts: (1) BRN disputes that it owes anything for the cost savings incentive bonus; (2) ACI has never billed BRN for the costs savings incentive bonus; and (3) there are genuine issues of material fact as to whether the items that ACI seeks to recover are true cost savings or rather non-compensable contractually agreed reductions in the scope of work for the 6416 Contract.

**a. BRN disputes that it owes anything for the costs savings incentive bonus.**

The costs savings incentive bonus was negotiated by BRN's president, Marshall Chesrown, and ACI's executive officer, Bill Radobenko. Marshall Chesrown asserts that BRN does not owe ACI anything under the costs savings incentive provision of the 6416 Contract. *See Affidavit of Marshall Chesrown. See Opposition SOF at ¶ 31.* More specifically, ACI executive officer Bill Radobenko testified as follows at the Rule 30(b)(6) deposition of ACI.

Q. Why was an invoice never sent to BRN?

A. I discussed it with Marshall, and I think at the time I wasn't really happy with his response about the cost savings incentive.

Q. What was his response?

A. I think his exact words were -- excuse me, Ladies -- fuck you.

*See Rule 30(b)(6) Deposition of ACI by William Charles Radobenko at 37:11-17, attached within Ex. C to the 2nd Gill Aff.*

The testimony of Marshall Chesrown and Bill Radobenko clearly creates a genuine issue of material fact as to whether BRN owes anything to ACI for cost savings incentive bonus under Contract 6416.



**b. ACI has never billed BRN for the cost savings incentive bonus.**

ACI also admits that it has never billed ACI for the cost saving incentive bonus, even though ACI last supplied labor, services, equipment, or furnished materials to the Project under the 6416 Contract on May 15, 2008. See Opposition SOF at ¶ 34. The fact that ACI failed to bill BRN for this work for over three years also creates a genuine issue of material fact as to whether BRN owes anything to ACI for the alleged cost savings incentive bonus under Contract 6416.

**c. There is a genuine issue of material fact as to whether the amounts claimed by ACI relate to true cost savings or rather non-compensable contractually agreed reductions in the scope of ACI's work.**

ACI's executive officer Bill Radobenko testified that the intent of the cost savings incentive bonus was to provide ACI with a fifteen to seventeen percent profit margin on Contract 6416. See Opposition SOF at ¶ 33. BRN representative Kyle Capps testified that the intent of the cost savings incentive bonus was to provide additional payments to ACI when ACI's work under Contract 6416 resulted in cost savings to the Project, but was not intended to pay ACI a bonus for work that was not completed on the Project. See Opposition SOF at ¶ 32.

The payment applications produced by ACI and BRN reflect that ACI and BRN agreed to multiple change orders that reduced the scope of ACI's work under Contract 6416, resulting in a \$1,710,568.32 drop in the contract price as a result of those change orders, i.e., the total price for Contract 6416 dropped from \$7,663,199.58 to \$5,952,631.26 as a result of those change orders. See Opposition SOF at ¶¶ 38-39. ACI's internal account records produced in this action show that ACI has received \$6,608,243.90 from BRN as payments for its work performed under Contract 6416. See Opposition SOF at ¶ 41. Put another way, to date, ACI has already received \$655,612.70 more than what BRN agreed to pay for Contract 6416 and now through the

cost savings component ACI is seeking to recover another \$1,130,711.31, which would put ACI's total receipt for Contract 6416 at \$7,738,955.21, or more than ACI's originally agreed upon contract price even though it is undisputed that ACT's scope of work under Contract 6416 was drastically reduced as the Project progressed.

Additionally, this Court should carefully scrutinize the summary produced by ACI that attempts to calculate the cost savings incentive bonus. This summary reflects that ACI's scope of work was drastically reduced on several items included within the original scope of work for the 6416 Contract, which creates a question of fact as to whether the amounts claimed by ACI relate to work performed by ACI that resulted in cost savings or whether ACI is attempting to recover a bonus for work that it did not perform. See Opposition SOF at ¶¶ 39 and 43. For example, the summary produced by ACI in support of its claim for a cost savings incentive bonus lists columns for "original contract amount," "total amount billed," and "total cost savings." See Opposition SOF at ¶ 43. On the first page of the summary, there is a column under Schedule 2.c. for "Drill & Shoot Golf Course and Roads." The total amount originally bid for that scope of work was \$975,672.36 and the amount actually billed for that work was \$33,408.30. *Id.* As a result, ACI is claiming that it is owed half of the \$942,266.06 difference between those two numbers, although it is patently obvious that the reduction in price is due to a drastic decrease in the scope of work for that line item rather than a cost savings from the manner in which ACI performed the work for that line item. *Id.* The comments section to ACI summary also supports American Bank's argument that this was not really a cost savings, but rather a reduction in the scope of work performed for that line item: "We did not encounter as much rock that was anticipated, because we were able to adjust certain grades to avoid rock areas, and when we moved in the D-11 dozer we are able to rip rock areas that would normally have to have been

drilled and shot (blasting).” *Id.* Similar entries are found under column 2.h. where ACI originally bid \$183,720.42 for “Drill & Shoot Golf Course & Haul Roads” but billed only \$11,838.59 for that line item and column 3.j. where ACI bid \$514,530.90 for “Haul Shot & Place Shot Rock for Swales” but billed nothing for that line item because the work was never performed. *Id.* But yet again, ACI is claiming the differences between the bid line item and the amount actually billed as a cost savings. *Id.*

ACI also failed to provide any explanation at its 30(b)(6) deposition as to why its first progress billings contained a line item for mobilization general conditions in the total amount of \$742,000, and then why later billings reflected the total amount owing for that line item as \$547,560.00. *See* Opposition SOF at ¶ 42. Notwithstanding ACI’s inability to explain that discrepancy, ACI is claiming the difference as a cost savings and include half of that difference as an amount it is seeking to recover through the foreclosure of its claim of lien.

In sum, there are multiple genuine issues of material fact as to whether ACI is entitled to the cost savings bonus in the first instance.

**3. American Bank waived its lien rights for the retainage owing on the various contracts encompassing ACI’s claim of lien.**

Following the trial on the validity and amount of Wadsworth’s claim of lien, this Court ruled that American Bank had standing to enforce the Golden Releases, further holding that the Golden Releases unambiguously waived Wadsworth’s right to lien for labor, services, equipment or materials supplied to the Project prior to the date inserted in the last Golden Release executed by Wadsworth. *See* Wadsworth Verdict at 26-35. ACI offers nothing to distinguish its case from Wadsworth’s case, except for regurgitating arguments previously raised by Wadsworth and rejected by this Court, i.e., the Golden Releases are not enforceable because of: (1) lack of consideration; (2) lack of standing as a third-party beneficiary; and (3) ACI did

not understand the legal effect of the Golden Releases. *See* Wadsworth Verdict at 26-35. But as mentioned previously, there is sufficient consideration to bind ACI to the Golden Releases, and American Bank has standing to enforce the Golden Releases both as a competing lien claimant and as a third-party beneficiary.

As for ACI's understanding of the Golden Releases, this Court should strike all such testimony offered by ACI as there is no showing that the language in the Golden Releases is ambiguous – ACI does not argue that the language is ambiguous, but rather argues that it did not intend to be bound by the language contained in the Golden Releases – and this Court has already determined that the identical Golden Releases executed by Wadsworth are unambiguous. *See* Wadsworth Verdict at 33 (“To the extent that Wadsworth offers Harrell’s testimony about his understanding of the meaning or legal effect of the Golden Release, that evidence is irrelevant as there is no argument that the waiver language contained in the last Golden Release is ambiguous and, thus, any such parol evidence will not be considered by the Court.”); *Cannon v. Perry*, 144 Idaho 728, 731, 170 P.3d 393, 396 (2007) (“Under the parol evidence rule, when a contract has been reduced to a writing that the parties intend to be a final statement of their agreement, evidence of any prior or contemporaneous agreements or understandings which relate to the same subject matter is not admissible to vary, contradict, or enlarge the terms of the written contract.”).

In this case, like the Wadsworth matter, ACI seeks to recover unpaid retainage that amounts to a claim for labor, services, material and equipment supplied prior to the dates inserted in the Golden Releases that ACI executed and delivered to BRN. *See* Exs. G and I-T to 2nd Gill Aff. And because there is a genuine issue of material fact about the amount of ACI's

lien that is waived by the Golden Releases that ACI executed, this Court should deny ACI's motion for summary judgment that seeks a final judgment on the amount of ACI's claim of lien.

**C. American Bank Did Not Waive the Issue of Priority by Posting the Lien Bond.**

ACI argues that American Bank waived the right to contest the priority of its Mortgage with ACI's claim of lien by posting the ACI lien bond. American Bank incorporates by reference all of its arguments raised against Wadsworth Golf Company of the Southwest's motion for summary judgment on this same issue, as well as all of the arguments raised in American Bank's motion for reconsideration of the Court's February 2, 2011, order granting judgment in favor of Wadsworth on this issue. *See* American Bank's Response to Wadsworth Memorandum in Re Summary Judgment Motions filed December 2, 2010; American Bank's Memorandum in Support of Motion for Reconsideration of This Court's Memorandum Decision, Findings of Fact and Conclusions of Law and Order Re: American Bank's and Wadsworth Golf Construction Company of the Southwest's Cross Motion for Partial Summary Judgment, filed February 16, 2011; Affidavit of Jeffrey B. Davies filed February 16, 2011; Plaintiff American Bank's Reply Memorandum in Support of Motion for Reconsideration of Wadsworth MSJ Order and Motion for Permissive Appeal filed March 17, 2011.

In sum, ACI should only be able to recover from the lien bond that amount that ACI can prove that it would have recovered by foreclosing its lien against the property. And the evidence of record in this case establishes that ACI's claim of lien was subordinated to American Bank's mortgage via the fact that ACI commenced work on the Project under all of the contracts encompassing ACI's claim lien after American Bank recorded its mortgage, with the exception of the 6416 Contract, and ACI subordinated its claim of lien to American Bank's Mortgage for any amount owing for the 6416 Contract via ACI's execution of the Golden Releases. *See*

Opposition SOF at ¶¶ 44-51.<sup>7</sup> Finally, nobody beat American Bank's credit bid made at the sheriff's sale held as part of the foreclosure of American Bank's mortgage. See Opposition SOF at ¶ 52. Thus, ACI would have recovered nothing by foreclosing its claim of lien against the property, and allowing ACI to collect from the lien bond would result in a pure windfall to ACI simply because American Bank posted the lien bond.

### III. CONCLUSION

For the foregoing reasons, this Court should deny ACI's motion for summary judgment regarding the validity and amount of its claim of lien.

DATED this 16<sup>th</sup> day of November, 2011.

MOFFATT, THOMAS, BARRETT, ROCK &  
FIELDS, CHARTERED

By



C. Clayton Gill – Of the Firm  
Attorneys for Plaintiff

<sup>7</sup> The Golden Releases executed by ACI are identical to the Golden Releases executed by Wadsworth. When addressing the Wadsworth Golden Releases, this Court held:

More specifically, the Golden Release form states, "upon receipt of the payment stated above, the undersigned agrees that any lien that may be filed for work performed after said date will only have lien priority from and after the date stated above and will be subordinate to any liens or encumbrances attaching to the subject property prior to said date." . . . Pursuant to that language, Wadsworth agreed to subordinate its lien priority date to other third party liens that attached to the property prior to the date inserted in the Golden Release. . . . Finally the Golden Release by its express terms included such subordination and waiver terms for the express benefit of "any liens or encumbrances attaching to the subject property prior to said date," including American Bank's mortgage lien.

See Wadsworth Verdict at 30-31.

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 16<sup>th</sup> day of November, 2011, I caused a true and correct copy of the foregoing **AMERICAN BANK'S MEMORANDUM IN OPPOSITION TO ACI'S MOTION FOR SUMMARY JUDGMENT** to be served by the method indicated below, and addressed to the following:

John R. Layman  
LAYMAN, LAYMAN & ROBINSON, PLLP  
601 S. Division St.  
Spokane, WA 99202  
Facsimile (509) 624-2902  
*Attorney for Defendants BRN Development,  
BRN Investments, BRN-Lake View Joint  
Venture, Marshall Chesrown, Lake View AG,  
Robert Levin, Trustee For The Roland M.  
Casati Family Trust, Dated June 5, 2008*

☐ U.S. Mail, Postage Prepaid  
☐ Hand Delivered  
☐ Overnight Mail  
☐ Facsimile  
☒ E-mail

Charles B. Lempesis  
ATTORNEY AT LAW  
W. 201 Seventh Ave.  
Post Falls, ID 83854  
Facsimile (208) 773-1044  
*Attorney for Defendant Thorco, Inc.*

☐ U.S. Mail, Postage Prepaid  
☐ Hand Delivered  
☐ Overnight Mail  
☐ Facsimile  
☒ E-mail

Edward J. Anson  
WITHERSPOON, KELLEY, DAVENPORT  
& TOOLE, P.S.  
608 Northwest Blvd. #300  
Coeur d'Alene, ID 83814-2146  
Facsimile (208) 667-8470  
*Attorney for Defendants The Turf Corporation,  
Wadsworth Golf Construction Company of the  
Southwest and Precision Irrigation, Inc.*

☐ U.S. Mail, Postage Prepaid  
☐ Hand Delivered  
☐ Overnight Mail  
☐ Facsimile  
☒ E-mail

Richard D. Campbell  
CAMPBELL & BISSELL, PLLC  
7 S. Howard St. #416  
Spokane, WA 99201  
Facsimile (509) 455-7111  
*Attorneys for Defendant Polin & Young  
Construction*

☐ U.S. Mail, Postage Prepaid  
☐ Hand Delivered  
☐ Overnight Mail  
☐ Facsimile  
☒ E-mail

M. Gregory Embrey  
WITHERSPOON, KELLEY, DAVENPORT &  
TOOLE, P.S.  
608 NW Blvd., Suite 300  
Coeur d'Alene, ID 83814-2174  
Facsimile (208) 667-8470  
*Attorney for Defendant Taylor Engineering, Inc.*

( ) U.S. Mail, Postage Prepaid  
( ) Hand Delivered  
( ) Overnight Mail  
(☒) Facsimile  
(☒) E-mail

Steven C. Wetzel  
Kenneth L. Huitt  
JAMES, VERNON & WEEKS, PA  
1626 Lincoln Way  
Coeur d'Alene, ID 83814  
Facsimile (208) 664-1684  
*Attorneys for Defendant ACT Northwest, Inc.*

( ) U.S. Mail, Postage Prepaid  
( ) Hand Delivered  
( ) Overnight Mail  
(☒) Facsimile  
( ) E-mail

Terrance R. Harris  
RAMSDEN & LYONS, LLP  
700 Northwest Blvd.  
P.O. Box 1336  
Coeur d'Alene, ID 83816-1336  
*Attorneys for Receiver*

( ) U.S. Mail, Postage Prepaid  
( ) Hand Delivered  
( ) Overnight Mail  
( ) Facsimile  
(☒) E-mail

Douglas S. Marlice  
RAMSDEN & LYONS, LLP  
700 Northwest Blvd.  
P.O. Box 1336  
Coeur d'Alene, ID 83816-1336  
*Attorneys for Defendant Ryker Young Revocable Trust*

( ) U.S. Mail, Postage Prepaid  
( ) Hand Delivered  
( ) Overnight Mail  
( ) Facsimile  
(☒) E-mail

  
\_\_\_\_\_  
C. Clayton Gill



STATE OF IDAHO  
COUNTY OF KOOTENAI } SS  
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CLERK DISTRICT COURT  
DEPUTY  
*Paul Thompson*

Randall A. Peterman, ISB No. 1944  
C. Clayton Gill, ISB No. 4973  
Tyler J. Anderson, ISB No. 6632  
MOFFATT, THOMAS, BARRETT, ROCK &  
FIELDS, CHARTERED  
101 S. Capitol Blvd., 10th Floor  
Post Office Box 829  
Boise, Idaho 83701  
Telephone (208) 345-2000  
Facsimile (208) 385-5384  
rap@moffatt.com  
ccg@moffatt.com  
tya@moffatt.com  
23690.0022

Nancy L. Isserlis, ISB No. 7331  
Elizabeth A. Tellessen, ISB No. 7393  
WINSTON & CASIATT  
250 Northwest Blvd., Suite 107A  
Coeur d'Alene, Idaho 83814  
Telephone (509) 838-6131  
Facsimile (509) 838-1416

Attorneys for Plaintiff

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

AMERICAN BANK, a Montana banking  
corporation,

Plaintiff,

vs.

BRN DEVELOPMENT, INC., an Idaho  
corporation, BRN INVESTMENTS, LLC, an  
Idaho limited liability company, LAKE VIEW  
AG, a Liechtenstein company, BRN-LAKE  
VIEW JOINT VENTURE, an Idaho general  
partnership, ROBERT LEVIN, Trustee for the  
ROLAND M. CASATI FAMILY TRUST,  
dated June 5, 2008, RYKER YOUNG, Trustee

Case No. CV 09-2619

**MEMORANDUM IN SUPPORT OF  
MOTION TO STRIKE PORTIONS OF  
THE AFFIDAVITS SUBMITTED BY  
ACI NORTHWEST, INC. IN SUPPORT  
OF ITS MOTION FOR SUMMARY  
JUDGMENT**

**MEMORANDUM IN SUPPORT OF MOTION TO STRIKE PORTIONS OF THE  
AFFIDAVITS SUBMITTED BY ACI NORTHWEST, INC. IN SUPPORT OF ITS  
MOTION FOR SUMMARY JUDGMENT - 1**

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Client:2244066.1

for the RYKER YOUNG REVOCABLE TRUST, MARSHALL CHESROWN a single man, IDAHO ROOFING SPECIALIST, LLC, an Idaho limited liability company, THORCO, INC., an Idaho corporation, CONSOLIDATED SUPPLY COMPANY, an Oregon corporation, INTERSTATE CONCRETE & ASPHALT COMPANY, an Idaho corporation, CONCRETE FINISHING, INC., an Arizona corporation, THE TURF CORPORATION, an Idaho corporation, WADSWORTH GOLF CONSTRUCTION COMPANY OF THE SOUTHWEST, a Delaware corporation, POLIN & YOUNG CONSTRUCTION, INC., an Idaho corporation, TAYLOR ENGINEERING, INC., a Washington corporation, PRECISION IRRIGATION, INC., an Arizona corporation and SPOKANE WILBERT VAULT CO., a Washington corporation, d/b/a WILBERT PRECAST,

Defendants.

Cross-Defendant American Bank ("American Bank") hereby submits the following memorandum in support of its motion to strike portions of the affidavits of William Radobenko, Berta Bagley, Delores Fletcher, Ada Loper, and Doug Foster that ACI Northwest, Inc. filed on November 3, 2011, in support of its motion for summary judgment.

**A. Motion to Strike Conclusory Allegations.**

American Bank hereby moves to strike the following conclusory allegations contained in the affidavits that ACI submitted in support of its motion for summary judgment. Idaho Rule of Civil Procedure 56(e) and Idaho case law makes it clear that affidavits filed in support of any motion for summary judgment must be based upon personal knowledge and cannot be based upon conclusory statements. I.R.C.P. 56(e) ("Supporting and opposing

affidavits shall be made on personal knowledge, shall set forth facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein.”); *State v. Shama Resources Ltd. Partnership*, 127 Idaho 267, 271, 899 P.2d 977, 981 (1995) (“The requirements of Rule 56(e) are not satisfied by an affidavit that is conclusory, based on hearsay, and not supported by personal knowledge.”); *Hecla Mining Co. v. Star-Morning Mining Co.*, 122 Idaho 778, 786, 839 P.2d 1192, 1200 (1992) (“We agree with the trial court that these statements are conclusory and do not provide the kind of specific, admissible facts that will either support or prevent the entry of summary judgment.”).

- Paragraphs 8, 9, and 10 of the Radobenko Affidavit, paragraphs 4, 5, 8, 9, and 10 of the Bagley Affidavit, and paragraphs 4, 5, and 7 of the Fletcher Affidavit, wherein Mr. Radobenko, Ms. Bagley and Ms. Fletcher allege that ACI never agreed to use the Golden Releases, that ACI did not subordinate its lien rights to American Bank’s mortgage by signing the Golden Releases, and that ACI did not receive sufficient consideration to make the Golden Releases binding and enforceable.

This Court should strike all of these statements as improper conclusory allegations. As set forth in American Bank’s statement of facts and memorandum in opposition to ACI’s motion for summary judgment, ACI signed contracts with BRN that required the use of the Golden Releases. Further, the terms of ACI’s bilateral contract with BRN provide sufficient consideration to make the Golden Releases binding upon ACI according to the plain meaning of the words used in such Golden Releases. Additionally, American Bank, as a competing lien claimant and intended third party beneficiary, has standing to enforce the terms of the Golden Releases.

This Court should also strike the following conclusory statements contained in the Loper Affidavit:

- Paragraphs 14 and 15 wherein Ms. Loper states in conclusory fashion that ACI's claim of lien was recorded in a timely manner and that ACI filed its action to foreclose its claim of lien in a timely matter. As set forth in American Bank's motion for summary judgment filed on November 3, 2011, ACI recorded its claim of lien too late and filed its action to foreclose its claim of lien too late.
- Paragraph 17 of the Loper Affidavit and paragraph 16 of the Foster Affidavit wherein Ms. Loper and Mr. Foster allege that ACI is owed interest, costs, and attorney fees.

**B. Motion to Strike Statements That Contradict ACI's 30(b)(6) Deposition Testimony.**

ACI hereby moves to strike the following statements made in ACI's declarations that are directly contrary to the testimony given by ACI at the Rule 30(b)(6) depositions of ACI, which testimony is binding as an admission upon ACI.

- Paragraphs 7 and 11 of the Radobenko Affidavit, paragraph 9 of the Bagley Affidavit, and paragraph 7 of the Fletcher Affidavit that allege that the Golden Release form was not attached as Exhibit B to the contracts that ACI signed with BRN or otherwise presented to ACI before it signed the contracts with BRN. ACI admitted at its 30(b)(6) deposition that the Golden Release form was attached to the contracts signed by ACI and removed after they were executed and placed in ACI's billing file for use

in its payment applications that it submitted to BRN. *See Foster Depo.* at 36:8-25, 65:13-21, 66:11-19, 67:3-10, attached as Ex. A to the Affidavit of C. Clayton Gill in Opposition to ACI's Motion for Summary Judgment ("2nd Gill Aff.").

- Paragraph 11 of the Radobenko Affidavit wherein Mr. Radobenko alleges that Berta Bagley and Delores Fletcher did not have authority to sign the Golden Releases. Those statements are directly contrary to Mr. Radobenko's sworn testimony given at the ACI 30(b)(6) deposition taken on March 8, 2011 (*see Radobenko Depo.* at 48:25 - 50:1, attached as Ex. C to 2nd Gill Aff.), are directly contrary to the statement contained in every Golden Release signed by Ms. Bagley and Ms. Fletcher, wherein each states: "the undersigned certifies under penalty of perjury under the laws of the State of Idaho that he or she is authorized to execute the same on behalf of the company to be bound," (*see Exs. U, V, and W to 2nd Gill Aff.*) and contradicts every corporate acknowledgement contained in each Golden Release executed by Ms. Bagley and Ms. Fletcher (*Id.*). For these same reasons, this Court should strike the similar paragraph 10 of the Bagley Affidavit and paragraph 6 of the Fletcher Affidavit that likewise attempts to disavow Ms. Bagley's and Ms. Fletcher's authority to sign and bind ACI to the terms of the Golden Releases.
- Paragraphs 3 and 5 of the Radobenko Affidavit wherein Mr. Radobenko alleges that ACI commenced work on the golf course project after being advised that a construction loan was available for the Project. Those

statements are directly contrary to Mr. Radobenko's sworn testimony given at the ACI 30(b)(6) deposition taken on March 8, 2011, wherein ACI admitted that it began construction 2 or 3 months before it knew that BRN had secured a loan to assist with the financing of the project. *See Radobenko Depo.* at 55:13-56:3, attached as Ex. C to 2nd Gill Aff.

**C. Motion to Strike Inadmissible Parol Evidence.**

ACI hereby moves to strike the following statements offered by ACI representatives regarding their interpretation of the unambiguous Golden Releases signed by ACI, except to the extent they are legal admissions against ACI's interest. *See Memorandum Decision, Findings of Fact, Conclusions of Law, and Order Following Court Trial as to American Bank's and Wadsworth Golf Construction Company of the Southwest's Claims at 33* ("To the extent that Wadsworth offers Harrell's testimony about his understanding of the meaning or legal effect of the Golden Release, that evidence is irrelevant as there is no argument that the waiver language contained in the last Golden Release is ambiguous and, thus, any such parol evidence will not be considered by the Court."); *Cannon v. Perry*, 144 Idaho 728, 731, 170 P.3d 393, 396 (2007) ("Under the parol evidence rule, when a contract has been reduced to a writing that the parties intend to be a final statement of their agreement, evidence of any prior or contemporaneous agreements or understandings which relate to the same subject matter is not admissible to vary, contradict, or enlarge the terms of the written contract.").

- Paragraph 8 of the Radobenko Affidavit, paragraphs 4, 5, 8, and 9 of the Bagley Affidavit, and paragraphs 4-7 of the Fletcher Affidavit that claim that the Golden Releases did not subordinate ACI's claim of lien to American Bank's mortgage.

**D. Motion to Strike Inadmissible Hearsay.**

ACI hereby moves to strike the following hearsay statements offered by ACI in the affidavits it filed in support of its motion for summary judgment. *Shama Resources*, 127 Idaho at 271, 899 P.2d at 981 ("The requirements of Rule 56(e) are not satisfied by an affidavit that is ... based on hearsay. . . .").

- Paragraphs 11 and 12, and 20 of the Loper Affidavit and paragraphs 8, 14, and 16 of the Foster Affidavit that refer to inadmissible hearsay statements made by BRN representative Kyle Capps.

**II. CONCLUSION**

Pursuant to Rule 56(e), this Court should strike the aforementioned portions of the Affidavits of William Radobenko, Berta Bagley, Delores Fletcher, Ada Loper, and Doug Foster that ACI Northwest, Inc. filed on November 3, 2011, in support of its motion for summary judgment.

DATED this 16th day of November, 2011.

MOFFATT, THOMAS, BARRETT, ROCK &  
FIELDS, CHARTERED

By 

C. Clayton Gill – Of the Firm  
Attorneys for Plaintiff

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 16th day of November, 2011, I caused a true and correct copy of the foregoing **MEMORANDUM IN SUPPORT OF MOTION TO STRIKE PORTIONS OF THE AFFIDAVITS SUBMITTED BY ACI NORTHWEST, INC. IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT** to be served by the method indicated below, and addressed to the following:

John R. Layman  
LAYMAN, LAYMAN & ROBINSON, PLLP  
601 S. Division St.  
Spokane, WA 99202  
Facsimile (509) 624-2902  
*Attorney for Defendants BRN Development,  
BRN Investments, BRN-Lake View Joint  
Venture, Marshall Chesrown, Lake View AG,  
Robert Levin, Trustee For The Roland M.  
Casati Family Trust, Dated June 5, 2008*

( ) U.S. Mail, Postage Prepaid  
( ) Hand Delivered  
( ) Overnight Mail  
( ) Facsimile  
(☒) E-mail

Charles B. Lempesis  
ATTORNEY AT LAW  
W. 201 Seventh Ave.  
Post Falls, ID 83854  
Facsimile (208) 773-1044  
*Attorney for Defendant Thorco, Inc.*

( ) U.S. Mail, Postage Prepaid  
( ) Hand Delivered  
( ) Overnight Mail  
( ) Facsimile  
(☒) E-mail

Edward J. Anson  
WITHERSPOON, KELLEY, DAVENPORT  
& TOOLE, P.S.  
608 Northwest Blvd. #300  
Coeur d'Alene, ID 83814-2146  
Facsimile (208) 667-8470  
*Attorney for Defendants The Turf Corporation,  
Wadsworth Golf Construction Company of the  
Southwest and Precision Irrigation, Inc.*

( ) U.S. Mail, Postage Prepaid  
( ) Hand Delivered  
( ) Overnight Mail  
( ) Facsimile  
(☒) E-mail

Richard D. Campbell  
CAMPBELL & BISSELL, PLLC  
7 S. Howard St. #416  
Spokane, WA 99201  
Facsimile (509) 455-7111  
*Attorneys for Defendant Polin & Young  
Construction*

( ) U.S. Mail, Postage Prepaid  
( ) Hand Delivered  
( ) Overnight Mail  
( ) Facsimile  
(☒) E-mail



M. Gregory Embrey  
WITHERSPOON, KELLEY, DAVENPORT &  
TOOLE, P.S.  
608 NW Blvd., Suite 300  
Coeur d'Alene, ID 83814-2174  
Facsimile (208) 667-8470  
*Attorney for Defendant Taylor Engineering, Inc.*

☐ U.S. Mail, Postage Prepaid  
☐ Hand Delivered  
☐ Overnight Mail  
☐ Facsimile  
☒ E-mail

Steven C. Wetzel  
Kenneth L. Huitt  
JAMES, VERNON & WEEKS, PA  
1626 Lincoln Way  
Coeur d'Alene, ID 83814  
Facsimile (208) 664-1684  
*Attorneys for Defendant ACI Northwest, Inc.*

☐ U.S. Mail, Postage Prepaid  
☐ Hand Delivered  
☐ Overnight Mail  
☒ Facsimile  
☐ E-mail

Terrance R. Harris  
RAMSDEN & LYONS, LLP  
700 Northwest Blvd.  
P.O. Box 1336  
Coeur d'Alene, ID 83816-1336  
*Attorneys for Receiver*

☐ U.S. Mail, Postage Prepaid  
☐ Hand Delivered  
☐ Overnight Mail  
☐ Facsimile  
☒ E-mail

Douglas S. Marfice  
RAMSDEN & LYONS, LLP  
700 Northwest Blvd.  
P.O. Box 1336  
Coeur d'Alene, ID 83816-1336  
*Attorneys for Defendant Ryker Young Revocable Trust*

☐ U.S. Mail, Postage Prepaid  
☐ Hand Delivered  
☐ Overnight Mail  
☐ Facsimile  
☒ E-mail

  
\_\_\_\_\_  
C. Clayton Gill

STATE OF IDAHO  
COUNTY OF KOOTENAI } SS  
FILED:

Randall A. Peterman, ISB No. 1944  
C. Clayton Gill, ISB No. 4973  
Tyler J. Anderson, ISB No. 6632  
MOFFATT, THOMAS, BARRETT, ROCK &  
FIELDS, CHARTERED  
101 S. Capitol Blvd., 10th Floor  
Post Office Box 829  
Boise, Idaho 83701  
Telephone (208) 345-2000  
Facsimile (208) 385-5384  
rap@moffatt.com  
ccg@moffatt.com  
tya@moffatt.com  
23690.0022

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Nancy L. Isserlis, ISB No. 7331  
Elizabeth A. Tellessen, ISB No. 7393  
WINSTON & CASHATT  
250 Northwest Blvd., Suite 107A  
Coeur d'Alene, Idaho 83814  
Telephone (509) 838-6131  
Facsimile (509) 838-1416

Attorneys for Plaintiff

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

AMERICAN BANK, a Montana banking  
corporation.

Plaintiff,

vs.

BRN DEVELOPMENT, INC., an Idaho  
corporation, BRN INVESTMENTS, LLC, an  
Idaho limited liability company, LAKE VIEW  
AG, a Liechtenstein company, BRN-LAKE  
VIEW JOINT VENTURE, an Idaho general  
partnership, ROBERT LEVIN, Trustee for the  
ROLAND M. CASATI FAMILY TRUST,  
dated June 5, 2008, RYKER YOUNG, Trustee  
for the RYKER YOUNG REVOCABLE

Case No. CV 09-2619

**STATEMENT OF FACTS IN  
OPPOSITION TO ACI NORTHWEST,  
INC.'S MOTION FOR SUMMARY  
JUDGMENT**

TRUST, MARSHALL CHESROWN a single man, IDAHO ROOFING SPECIALIST, LLC, an Idaho limited liability company, THORCO, INC., an Idaho corporation, CONSOLIDATED SUPPLY COMPANY, an Oregon corporation, INTERSTATE CONCRETE & ASPHALT COMPANY, an Idaho corporation, CONCRETE FINISHING, INC., an Arizona corporation, THE TURF CORPORATION, an Idaho corporation, WADSWORTH GOLF CONSTRUCTION COMPANY OF THE SOUTHWEST, a Delaware corporation, POLIN & YOUNG CONSTRUCTION, INC., an Idaho corporation, TAYLOR ENGINEERING, INC., a Washington corporation, PRECISION IRRIGATION, INC., an Arizona corporation and SPOKANE WILBERT VAULT CO., a Washington corporation, d/b/a WILBERT PRECAST,

Defendants.

Cross-defendant American Bank ("American Bank") hereby submits the following statement of facts in opposition to cross-claimant ACI Northwest, Inc.'s ("ACI") motion for summary judgment.

**A. ACI Recorded Its Claim of Lien Too Late.**

1. ACI's claim of lien seeks payment for amounts allegedly owing under 12 different contracts between ACI and BRN Development, Inc. See Ex. A to Affidavit of C. Clayton Gill Filed in Support of American Bank's Motion for Summary Judgment on Invalidity of ACI's Claim of Lien, filed on November 3, 2011 ("1st Gill Aff.").

2. ACI billed BRN separately for each of the 12 contracts included within ACI's claim of lien. See Exs. G - H to the Affidavit of C. Clayton Gill in Opposition to ACI Northwest, Inc.'s Motion for Summary Judgment, filed on November 16, 2011 ("2nd Gill Aff.").

3. ACI last performed work under the 12 contracts that encompass its lien on January 10, 2009. See Transcript of the Rule 30(b)(6) deposition of ACI Northwest, Inc. by Douglas Foster ("Foster Depo.") at 38:7 - 39:10 and 72:5-11, attached as Ex. A to 2nd Gill Aff.; Ex. K to 1st Gill Aff.; *see also* Appendix A to American Bank's Statement of Undisputed Facts in Support of American Bank's Motion for Summary Judgment Against ACI Northwest, Inc. on Invalidity of ACI's Claim of Lien, filed on November 3, 2011 ("American Bank MSJ SOF").

4. ACI did not record its claim of lien until June 15, 2009. See Ex. A to 1st Gill Aff.

5. ACI's claim of lien does not seek the recovery of any amounts owing pursuant to the 9914 Contract. See Ex. A to 1st Gill Aff. BRN never authorized the work ACI performed under the 9914 Contract and disputes that it owes ACI anything for the labor, services, equipment and materials included within ACI's billings for the 9914 Contract. See Affidavit of Kyle Capps ("Capps Aff."), filed on November 4, 2011. ACI billed BRN's sister entity, Black Rock Development, Inc., for the labor, services, equipment and materials that ACI furnished under the 9914 Contract. See Ex. N to 1st Gill Aff.; Ex. A to Capps Aff.

**B. ACI Filed Its Action to Foreclose Its Claim of Lien Too Late.**

6. ACI received a \$1,000.00 payment from BRN on December 11, 2009, which ACI applied to the balance owing for work performed under the 8964 Contract. See American Bank MSJ SOF at ¶ 19.

7. ACI did not file an action to foreclose its claim of lien until June 7, 2010. See ACI Northwest, Inc.'s Answer to Taylor Engineering, Inc.'s Third Party Complaint, and Defendant ACI Northwest, Inc.'s Cross-Claim and Demand for Jury Trial filed on June 7, 2010.

**C. ACI Hired and Used an Unregistered Subcontractor to Complete Its Scope of Work for the Project.**

8. ACI hired North Idaho Drilling, Inc. to complete some of the scope of work encompassed within the 6416 Contract and the 8101 Contract. See Exs. Y and Z to 2nd Gill Aff.

9. North Idaho Drilling performed work on the Black Rock North Project ("Project") in 2007, under the 6416 Contract. See Ex. Y to 2nd Gill Aff.

10. North Idaho Drilling performed work on the Project in 2008, under the 8101 Contract. See Exs. BB, CC, and DD to 2nd Gill Aff.

11. At the time North Idaho Drilling performed work on the Project in 2007 and 2008, it was not registered as a contractor under Idaho's Contractor Registration Act (Idaho Code Section 54-5201, *et seq.*). See Ex. X to 2nd Gill Aff.

12. North Idaho Drilling billed ACI \$45,454.59 for its work completed in 2007 under the 6416 Contract. See Exs. Y and Z to 2nd Gill Aff.

13. ACI paid North Idaho Drilling \$44,116.12 for its work completed in 2007 under the 6416 Contract. See Ex. AA to 2nd Gill Aff.

14. ACI owes North Idaho Drilling \$1,338.47 for its work completed in 2007 under the 6416 Contract. See Exs. AA and FF to 2nd Gill Aff.

15. North Idaho Drilling billed ACI \$229,558.62 for its work completed in 2008 under the 8101 Contract. See Exs. CC and DD to 2nd Gill Aff.

16. ACI paid North Idaho Drilling \$151,784.88 for its work completed in 2008 under the 8101 Contract. See Ex. EE to 2nd Gill Aff.

17. ACI owes North Idaho Drilling \$77,773.74 for its work completed in 2008 under the 8101 Contract. See American Bank's MSJ SOF at ¶¶ 5-16.

**D. ACI Failed To Apportion or Limit Its Lien to the Property It Improved.**

18. ACI performed work under multiple different agreements with BRN. See American Bank's MSJ SOF at ¶¶ 5-16.

19. For many of the different agreements, ACI's work was limited to a small portion of the property encompassing the entire Project. See American Bank's MSJ SOF at ¶¶ 6-16.

20. ACI recorded its lien for all 12 contracts against the entire Project, i.e., the approximate 1,000 acres that includes both the golf course and the proposed surrounding residential developments. See Ex. A to 1st Gill Aff.; Affidavit of Ada Loper in Support of ACI Northwest, Inc.'s Motion for Partial Summary Judgment at ¶ 14. In doing so, ACI made no attempt to apportion its lien or limit its lien to the property that it actually improved under each of the 12 contracts that encompass its lien. *Id.*

21. The construction of the golf course did not improve or increase the value of the surrounding residential lots. See testimony of Kyle Capps given at the Wadsworth trial on May 3, 2011.

**E. ACI Agreed To Waive and Subordinate Its Lien Rights.**

22. ACI entered into five separate written contracts with BRN, each with a different scope of work. See American Bank's MSJ SOF at ¶¶ 5-9.

23. All five of the written contracts between ACI and BRN state: "As a prerequisite for any payment, [ACI] shall provide, in a form satisfactory to Owner, partial lien releases, claim waivers, and affidavits of payment from [ACI], and its subcontractors and suppliers of any tier, for the billed portion of Subcontractor's work." See Ex. D to 1st Gill Aff.

at ACI 000005; Ex. F to 1st Gill Aff. at ACI 000028; Ex. G to 1st Gill Aff. at ACI 000054; Ex. H to 1st Gill Aff. at ACI 000071; and Ex. I to 1st Gill Aff. at ACI 000094.

24. All five of the written contracts between ACI and BRN state on the signature page that, "[t]he following Exhibits are attached and incorporated by reference: ... 'B', Interim Lien/Claim Waiver." See Ex. D to 1st Gill Aff. at ACI 000003; Ex. F to 1st Gill Aff. at ACI 000025-26; Ex. G to 1st Gill Aff. at ACI 000052; Ex. H to 1st Gill Aff. at ACI 000069; and Ex. I to 1st Gill Aff. at ACI 000091-92.

25. All five of the written contracts between ACI and BRN had the form Conditional Lien Waiver, Release and Subordination ("Golden Release"), marked Exhibit "B," attached to the contract. See Foster Depo. at 63:8-25, 65:13-21, 66:11-19, 67:3-10, attached as Ex. A to 2nd Gill Aff. After each of those five contracts was executed, ACI removed the form Golden Release from the contract and placed it in its billing file for use with its billings to BRN under each of those separate contracts. *Id.*

26. ACI executed and delivered Golden Releases to BRN with its payment applications that it submitted to BRN. See 2nd Gill Aff. at ¶¶ 8-23; Exs. H-W to 2nd Gill Aff.

27. The Golden Releases were executed by ACI Senior Vice President Roberta M. Bagley and ACI Secretary Delores Fletcher. See Exs. H-W to 2nd Gill Aff. Ms. Bagley and Ms. Fletcher had authority to sign the Golden Releases and bind ACI to the terms set forth in the Golden Releases. See Transcript of the Rule 30(b)(6) deposition of ACI Northwest, Inc. by William Radobenko ("Radobenko Depo.") at 48:25-50:1, attached as Ex. C to 2nd Gill Aff. Each of the Golden Releases states immediately above the signature block: "If signed on behalf of a company, the undersigned certifies under penalty of perjury under the laws of the State of Idaho that he or she is authorized to execute the same on behalf of the company to

be bound." See Exs. H-W to 2nd Gill Aff. The corporate acknowledgment executed by a notary for each Golden Release provides likewise. *Id.* Through the foreclosure of ACI's claim of lien, ACI seeks to recover retainage and through the execution of the Golden Releases, ACI waived its right to lien for such retainage. See Exs. G and I-T to 2nd Gill Aff.

**F. Facts Relating to the Cost Savings Incentive Bonus that ACI Seeks to Recover Under the 6416 Contract.**

28. ACI last supplied labor, services, material or equipment to the Project under the 6416 Contract on May 15, 2008. See Foster Depo. at 37:16 - 39:24, attached as Ex. A to 2nd Gill Aff.

29. On July 24, 2008, ACI executed and delivered a "Final Unconditional Lien Waiver, Release and Subordination." See Ex. V to 2nd Gill Aff. at BRD006493 and BRD006345. *Id.* The relevant text of that "Final Unconditional Lien Waiver, Release and Subordination," provides:

The undersigned hereby acknowledges receipt of \$297,631.59, check number 2751, dated July 24, 2008, as full and final payment for any and all work or labor performed, materials, equipment, goods, or things supplied or furnished, or any other claims or obligation owed through the date shown above, on the above-named Project, and the undersigned hereby waives any and all right to any lien whatsoever and releases all rights to lien or claim any lien against the real property associated with the above Project in connection with any and all work or labor performed, materials, equipment, goods or things supplied or furnished, or any other claims or obligations owed through the date shown above, on the above-named Project.

This waiver and release does not cover rights or obligations that might accrue after the above date for additional work that may be performed. In addition, upon receipt of the payment stated above, the undersigned agrees that any lien that may be filed for work performed after said date will only have lien priority from and after the date stated above and will be subordinate to any liens or encumbrances attaching to the subject property prior to said date.



30. ACI claims that the cost savings bonus is owed pursuant to the terms of the 6416 Contract. *See* Affidavit of Doug Foster in Support of ACI Northwest, Inc.'s Motion for Partial Summary Judgment at ¶ 9.2.

31. BRN denies that it owes ACI anything for the cost savings incentive provision of the 6416 Contract. *See* Radobenko Depo. at 37:11-17, attached as Ex. C to Gill Aff.

32. According to BRN, the cost savings incentive bonus was not intended to pay ACI a bonus for work that was not done, but rather to reward ACI for cost savings in the work that was actually completed. *See* Deposition of Kyle Capps taken on March 22, 2011 at 279:5-14, attached as Ex. A to the Affidavit of Steven C. Wetzel in Support of ACI Northwest, Inc.'s Motion for Partial Summary Judgment.

33. According to ACI, the intent of the cost savings incentive bonus was to provide ACI with a 15 to 17 percent profit margin on the 6416 Contract. *See* Radobenko Depo. at 19:10 - 20:19, 22:6 - 23:3, attached as Ex. C to 2nd Gill Aff.

34. ACI has never billed or invoiced BRN for the cost savings incentive bonus included within ACI's claim of lien. *See* Foster Depo. at 45:7-17, attached as Ex. A to 2nd Gill Aff.; Radobenko Depo. at 37:1-21, attached as Ex. C to 2nd Gill Aff.; *see* Transcript of the Rule 30(b)(6) deposition of ACI Northwest, Inc. by James Allan Haneke ("Haneke Depo.") at 27:8-21, attached as Ex. B to 2nd Gill Aff.

35. In its claim of lien, ACI asserts that the amount owing for the cost savings incentive bonus is \$1,045,752.57. *See* Ex. A to 1st Gill Aff.

36. At the Rule 30(b)(6) deposition taken of ACI on March 8, 2011, ACI claimed that BRN owed ACI \$1,130,711.31 for the cost savings incentive bonus. *See* Exs. E and F to 2nd Gill Aff. ACI came up with the new calculation for the cost savings incentive bonus

several weeks before the Rule 30(b)(6) deposition. *See* Foster Depo. at 20:3-10 and 23:13 - 24:10, attached as Ex. A to 2nd Gill Aff.

37. In its recently-filed motion for summary judgment, ACI asserts that the amount owing for the cost savings incentive bonus is \$736,781.75. *See* Affidavit of Ada Loper in Support of ACI Northwest, Inc.'s Motion for Partial Summary Judgment at ¶ 13; Affidavit of Doug Foster in Support of ACI Northwest, Inc.'s Motion for Partial Summary Judgment at ¶¶ 15-16.

38. The original contract price for the original scope of work included within the 6416 Contract was \$7,663,199.58. *See* Ex. D to 1st Gill Aff. at ACI 000003.

39. Through various change orders, ACT's scope of work was reduced and the contract price for the 6416 Contract was reduced to \$5,952,631.26. *See* Ex. I to 2nd Gill Aff. at BRD006482; Ex. J to 2nd Gill Aff. Some of the changes in the scope of work included reducing the scheduled value for the following line items:

- line item A-1 for "MOB & GENERAL CONDITIONS" was reduced from \$742,000.00 to \$547,560.00;
- line item B-1.03 for "DRILL 7 SHOOT GOLF COURSE & R" was reduced from \$975,672.36 to \$33,406.30;
- line item B-2.02 for "DRILL & SHOOT GOLF COURSE & R" was reduced from \$183,720.42 to \$11,838.59; and
- line item B-4.10 for "HAUL SHOT & PLACE SHOT ROCK" was reduced from \$514,530.90 to \$0.

Compare Ex. D to 1st Gill Aff. at ACI 000019 with Ex. I to 2nd Gill Aff. at BRD006483.

40. ACI has billed BRN \$6,608,243.90 for labor, services, equipment and materials that ACI and its subcontractors provided to the Project under the 6416 Contract. See Ex. H to 2nd Gill Aff.; Foster Depo. at 44:10 - 45:3, attached as Ex. A to 2nd Gill Aff.

41. BRN has paid \$6,608,243.90 to ACI for labor, services, equipment and materials that ACI and its subcontractors provided to the Project under the 6416 Contract. See Ex. H to 2nd Gill Aff.; Affidavit of Doug Foster in Support of ACI Northwest, Inc.'s Motion for Partial Summary Judgment at ¶ 9.1.

42. At ACI's Rule 30(b)(6) deposition, ACI was unable to explain why its first progress billings for the 6416 Contract contained a line item for mobilization general conditions in the total amount of \$742,000.00, and then why later billings reflected the total amount owing for that line item as \$547,560.00. Foster Depo. at 35:8-14, attached as Ex. A to 2nd Gill Aff.; Haneke Depo. at 19:1 - 20:12., attached as Ex. B to 2nd Gill Aff.; Radobenko Depo. at 31:20 - 33:6, attached as Ex. C to 2nd Gill Aff. Notwithstanding, ACI is claiming the difference as a cost savings to which it is entitled and is requesting a payment of half of that difference under the cost savings incentive provision of the 6416 Contract. See Ex. F to 2nd Gill Aff.

43. The summary that ACI prepared in support of its calculation for the cost savings incentive component contains several entries where ACI is seeking to recover a bonus for work it never performed, including:

- column 2.c. for "Drill & Shoot Golf Course and Roads." The amount originally bid for that scope of work was \$975,672.36 and the amount ACI billed for that work was \$33,408.30, with ACI noting that: "We did not encounter as much rock that was anticipated, because we were able to

adjust certain grades to avoid rock areas, and when we moved in the D-11 dozer we are able to rip rock areas that would normally have to have been drilled and shot (blasting)."

- column 2.h. for "Drill & Shoot Golf Course & Haul Roads." The amount originally bid for that scope of work was \$183,720.42, but the amount billed for that scope of work was only \$11,838.59.
- column 3.j. for "Haul Shot & Place Shot Rock for Swales." The amount originally bid for that scope of work was \$514,530.90, but ACI billed nothing for this scope of work, noting in the comments that this work was never performed.

Compare Ex. F to 2nd Gill Aff. with Ex. D to 1st Gill Aff. at ACI 000019.

**G. Facts Relating to Subrogation of ACI's Claim of Lien to American Bank's Mortgage.**

44. American Bank's mortgage was recorded against the property that encompasses the Project on February 6, 2007. See Ex. HH to 2nd Gill Aff. at AB002488.

45. ACI started work under 11 of the 12 contracts that encompass ACI's lien after American Bank recorded its mortgage. See Appendix A to American Bank's MSJ SOF at ¶¶ 6-16 to American Bank's MSJ SOF.

46. The only contract that ACI started work on before American Bank's mortgage was recorded was the 6416 Contract. See Foster Depo. at 39:25 - 40:2, attached as Ex. A to 2nd Gill Aff.

47. ACI started work under the 6416 Contract before it knew that BRN had any financing for the Project. Radobenko Depo. at 55:13 - 56:3, attached as Ex. C to 2nd Gill Aff.

48. ACI executed Golden Releases and submitted them to BRN with its payment applications for payment under the 6416 Contract, with each Golden Release stating:

Upon receipt of payment of the sum of \$ \_\_\_\_\_, the undersigned waives any and all right to any lien whatever and releases all rights to lien or claim any lien against the real property associated with the above Project by the undersigned in connection with any and all work or labor performed, materials, equipment, goods, or things supplied or furnished, or any other claims or obligations owed through the date shown above, on the above-named Project.

This waiver and release does not cover rights or obligations that might accrue after the above date for additional work that may be performed. In addition, upon receipt of the payment stated above, the undersigned agrees that any lien that may be filed for work performed after said date will only have lien priority from and after the date stated above and will be subordinate to any liens or encumbrances attaching to the subject property prior to said date.

See 2nd Gill Aff. at ¶¶ 9-23; Exs. I - W to 2nd Gill Aff.

49. American Bank's loan documents with BRN granted American Bank a first priority mortgage lien against the property upon which ACI was making improvements. See Ex. HH to 2nd Gill Aff. at AB002459, Section 5.14; see also transcript of deposition of Mark Hendrickson ("Hendrickson Depo.") at 239:19 - 230:10, attached as Ex. GG to 2nd Gill Aff.

50. American Bank's loan documents with BRN required BRN to obtain lien waivers from its contractors like ACI to protect the priority of American Bank's mortgage. See Ex. HH to 2nd Gill Aff. at AB002451, Section 2.3.1 and Ex. 14 to Hendrickson Depo. included within Ex. HH to 2nd Gill Aff. at EX089-003 and EX089-004; Hendrickson Depo. at 223:14 - 229:17, attached as Ex. GG to 2nd Gill Aff.

51. As required by BRN's loan documents with American Bank, BRN certified with each draw request that it had obtained lien waivers from its contractors as a

condition precedent to American Bank making payment on each draw request. *See* Exs. 15-21 to Hendrickson Depo. included within Ex. HH to 2nd Gill Aff.; Hendrickson Depo. at 230:11 - 232:7. American Bank then advanced loan funds to BRN to facilitate BRN's payments to ACI. *See* Deposition of Leon Royer at 248:19-25, attached as Ex. C to Affidavit of Steven C. Wetzel in Support of ACI Northwest, Inc.'s Motion for Partial Summary Judgment.

52. American Bank has foreclosed its mortgage lienhold interest in the property that encompasses the Project. *See* Judgment and Decree of Foreclosure of American Bank's Mortgage Secured by Black Rock North, filed on February 24, 2011. At the foreclosure sale, American Bank credit bid \$18,682,767.78, i.e., the amount BRN owes to American Bank, pursuant to the loan documents, that was secured by the mortgage. *See* Sheriff's Certificate of Sale, filed on June 7, 2011. No party bid more than American Bank's credit bid and, as a result, American Bank was issued a Sheriff's Deed for the property. *Id.*

DATED this 16<sup>th</sup> day of November, 2011.

MOFFATT, THOMAS, BARRETT, ROCK &  
FIELDS, CHARTERED

By 

C. Clayton Gill - Of the Firm  
Attorneys for Plaintiff

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 16<sup>th</sup> day of November, 2011, I caused a true and correct copy of the foregoing **STATEMENT OF FACTS IN OPPOSITION TO ACI NORTHWEST, INC.'S MOTION FOR SUMMARY JUDGMENT** to be served by the method indicated below, and addressed to the following:

John R. Layman  
LAYMAN, LAYMAN & ROBINSON, PLLP  
601 S. Division St.  
Spokane, WA 99202  
Facsimile (509) 624-2902  
*Attorney for Defendants BRN Development,  
BRN Investments, BRN-Lake View Joint  
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☒ E-mail

Charles B. Lempeis  
ATTORNEY AT LAW  
W. 201 Seventh Ave.  
Post Falls, ID 83854  
Facsimile (208) 773-1044  
*Attorney for Defendant Thorco, Inc.*

☐ U.S. Mail, Postage Prepaid  
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& TOOLE, P.S.  
608 Northwest Blvd. #300  
Coeur d'Alene, ID 83814-2146  
Facsimile (208) 667-8470  
*Attorney for Defendants The Turf Corporation,  
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Southwest and Precision Irrigation, Inc.*

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Richard D. Campbell  
CAMPBELL & BISSELL, PLLC  
7 S. Howard St. #416  
Spokane, WA 99201  
Facsimile (509) 455-7111  
*Attorneys for Defendant Polin & Young  
Construction*

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TOOLE, P.S.  
608 NW Blvd., Suite 300  
Coeur d'Alene, ID 83814-2174  
Facsimile (208) 667-8470  
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Kenneth L. Huitt  
JAMES, VERNON & WEEKS, PA  
1626 Lincoln Way  
Coeur d'Alene, ID 83814  
Facsimile (208) 664-1684  
*Attorneys for Defendant ACI Northwest, Inc.*

( ) U.S. Mail, Postage Prepaid  
( ) Hand Delivered  
( ) Overnight Mail  
(☒) Facsimile  
( ) E-mail

Terrance R. Harris  
RAMSDEN & LYONS, LLP  
700 Northwest Blvd.  
P.O. Box 1336  
Coeur d'Alene, ID 83816-1336  
*Attorneys for Receiver*

( ) U.S. Mail, Postage Prepaid  
( ) Hand Delivered  
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( ) Facsimile  
(☒) E-mail

Douglas S. Marfice  
RAMSDEN & LYONS, LLP  
700 Northwest Blvd.  
P.O. Box 1336  
Coeur d'Alene, ID 83816-1336  
*Attorneys for Defendant Ryker Young Revocable Trust*

( ) U.S. Mail, Postage Prepaid  
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C. Clayton Gill



STATE OF IDAHO  
COUNTY OF KOOTENAI } SS  
FILED:

2011 NOV 16 PM 4:09

CLERK DISTRICT COURT 626  
DEPUTY 02

Randall A. Peterman, ISB No. 1944  
C. Clayton Gill, ISB No. 4973  
Tyler J. Anderson, ISB No. 6632  
MOFFATT, THOMAS, BARRETT, ROCK &  
FIELDS, CHARTERED  
101 S. Capitol Blvd., 10th Floor  
Post Office Box 829  
Boise, Idaho 83701  
Telephone (208) 345-2000  
Facsimile (208) 385-5384  
rap@moffatt.com  
ccg@moffatt.com  
tya@moffatt.com  
23690.0022

Nancy L. Isserlis, ISB No. 7331  
Elizabeth A. Tellessen, ISB No. 7393  
WINSTON & CASHATT  
250 Northwest Blvd., Suite 107A  
Coeur d'Alene, Idaho 83814  
Telephone (509) 838-6131  
Facsimile (509) 838-1416

Attorneys for Plaintiff

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

AMERICAN BANK, a Montana banking  
corporation,

Plaintiff.

vs.

BRN DEVELOPMENT, INC., an Idaho  
corporation, BRN INVESTMENTS, LLC, an  
Idaho limited liability company, LAKE VIEW  
AG, a Liechtenstein company, BRN-LAKE  
VIEW JOINT VENTURE, an Idaho general  
partnership, ROBERT LEVIN, Trustee for the  
ROLAND M. CASATI FAMILY TRUST,  
dated June 5, 2008, RYKER YOUNG, Trustee  
for the RYKER YOUNG REVOCABLE

Case No. CV 09-2619

**MOTION TO STRIKE PORTIONS OF  
THE AFFIDAVITS SUBMITTED BY  
ACI NORTHWEST, INC. IN SUPPORT  
OF ITS MOTION FOR SUMMARY  
JUDGMENT**

**MOTION TO STRIKE PORTIONS OF THE AFFIDAVITS  
SUBMITTED BY ACI NORTHWEST, INC. IN SUPPORT  
OF ITS MOTION FOR SUMMARY JUDGMENT - 1**

1881

TRUST, MARSHALL CHESROWN a single man, IDAHO ROOFING SPECIALIST, LLC, an Idaho limited liability company, THORCO, INC., an Idaho corporation, CONSOLIDATED SUPPLY COMPANY, an Oregon corporation, INTERSTATE CONCRETE & ASPHALT COMPANY, an Idaho corporation, CONCRETE FINISHING, INC., an Arizona corporation, THE TURF CORPORATION, an Idaho corporation, WADSWORTH GOLF CONSTRUCTION COMPANY OF THE SOUTHWEST, a Delaware corporation, POLIN & YOUNG CONSTRUCTION, INC., an Idaho corporation, TAYLOR ENGINEERING, INC., a Washington corporation, PRECISION IRRIGATION, INC., an Arizona corporation and SPOKANE WILBERT VAULT CO., a Washington corporation, d/b/a WILBERT PRECAST,

Defendants.

COMES NOW Cross-Defendant American Bank ("American Bank"), and pursuant to Rule 56(e) of the Idaho Rules of Civil Procedure, hereby moves this Court for an order striking portions of the affidavits of William Radobenko, Berta Bagley, Delores Fletcher, Ada Loper, and Doug Foster filed in support of ACI Northwest, Inc.'s motion for summary judgment, filed on November 3, 2011. This motion is supported by a memorandum of law filed herewith.

DATED this 16th day of November, 2011.

MOFFATT, THOMAS, BARRETT, ROCK &  
FIELDS, CHARTERED

By 

C. Clayton Gill – Of the Firm  
Attorneys for Plaintiff

**MOTION TO STRIKE PORTIONS OF THE AFFIDAVITS  
SUBMITTED BY ACI NORTHWEST, INC. IN SUPPORT  
OF ITS MOTION FOR SUMMARY JUDGMENT - 2**

1882

Client:2244693.1

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 16th day of March, 2011, I caused a true and correct copy of the foregoing **MOTION TO STRIKE PORTIONS OF THE AFFIDAVITS SUBMITTED BY ACI NORTHWEST, INC. IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT** to be served by the method indicated below, and addressed to the following:

John R. Layman  
LAYMAN, LAYMAN & ROBINSON, PLLP  
601 S. Division St.  
Spokane, WA 99202  
Facsimile (509) 624-2902  
*Attorney for Defendants BRN Development,  
BRN Investments, BRN-Lake View Joint  
Venture, Marshall Chesrown, Lake View AG,  
Robert Levin, Trustee For The Roland M.  
Casati Family Trust, Dated June 5, 2008*

☐ U.S. Mail, Postage Prepaid  
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☐ Overnight Mail  
☐ Facsimile  
☒ E-mail

Charles B. Lempesis  
ATTORNEY AT LAW  
W. 201 Seventh Ave.  
Post Falls, ID 83854  
Facsimile (208) 773-1044  
*Attorney for Defendant Thorco, Inc.*

☐ U.S. Mail, Postage Prepaid  
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☐ Facsimile  
☒ E-mail

Edward J. Anson  
WITHERSPOON, KELLEY, DAVENPORT  
& TOOLE, P.S.  
608 Northwest Blvd. #300  
Coeur d'Alene, ID 83814-2146  
Facsimile (208) 667-8470  
*Attorney for Defendants The Turf Corporation,  
Wadsworth Golf Construction Company of the  
Southwest and Precision Irrigation, Inc.*

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Richard D. Campbell  
CAMPBELL & BISSELL, PLLC  
7 S. Howard St. #416  
Spokane, WA 99201  
Facsimile (509) 455-7111  
*Attorneys for Defendant Polin & Young  
Construction*

☐ U.S. Mail, Postage Prepaid  
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☐ Facsimile  
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**MOTION TO STRIKE PORTIONS OF THE AFFIDAVITS  
SUBMITTED BY ACI NORTHWEST, INC. IN SUPPORT  
OF ITS MOTION FOR SUMMARY JUDGMENT - 3**

1883

M. Gregory Embrey  
WITHERSPOON, KELLEY, DAVENPORT &  
TOOLE, P.S.  
608 NW Blvd., Suite 300  
Coeur d'Alene, ID 83814-2174  
Facsimile (208) 667-8470  
*Attorney for Defendant Taylor Engineering, Inc.*

☐ U.S. Mail, Postage Prepaid  
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☐ Overnight Mail  
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☒ E-mail

Steven C. Wetzel  
Kenneth L. Huitt  
JAMES, VERNON & WEEKS, PA  
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Coeur d'Alene, ID 83814  
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Terrance R. Harris  
RAMSDEN & LYONS, LLP  
700 Northwest Blvd.  
P.O. Box 1336  
Coeur d'Alene, ID 83816-1336  
*Attorneys for Receiver*

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RAMSDEN & LYONS, LLP  
700 Northwest Blvd.  
P.O. Box 1336  
Coeur d'Alene, ID 83816-1336  
*Attorneys for Defendant Ryker Young Revocable Trust*

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C. Clayton Gill

STATE OF IDAHO  
COUNTY OF KOOTENAI } SS  
FILED:

2011 NOV 17 AM 10:48

799  
D2CLERK DISTRICT COURT  
*C. J. [Signature]*  
DEPUTY

Randall A. Peterman, ISB No. 1944  
C. Clayton Gill, ISB No. 4973  
Tyler J. Anderson, ISB No. 6632  
MOFFATT, THOMAS, BARRETT, ROCK &  
FIELDS, CHARTERED  
101 S. Capitol Blvd., 10th Floor  
Post Office Box 829  
Boise, Idaho 83701  
Telephone (208) 345-2000  
Facsimile (208) 385-5384  
rap@moffatt.com  
ccg@moffatt.com  
tya@moffatt.com  
23690.0022

Nancy L. Isserlis, ISB No. 7331  
Elizabeth A. Tellessen, ISB No. 7393  
WINSTON & CASHATT  
250 Northwest Blvd., Suite 107A  
Coeur d'Alene, Idaho 83814  
Telephone (509) 838-6131  
Facsimile (509) 838-1416

Attorneys for Plaintiff

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

AMERICAN BANK, a Montana banking  
corporation,

Plaintiff,

vs.

BRN DEVELOPMENT, INC., an Idaho  
corporation, BRN INVESTMENTS, LLC, an  
Idaho limited liability company, LAKE VIEW  
AG, a Liechtenstein company, BRN-LAKE  
VIEW JOINT VENTURE, an Idaho general  
partnership, ROBERT LEVIN, Trustee for the  
ROLAND M. CASATI FAMILY TRUST,  
dated June 5, 2008, RYKER YOUNG, Trustee

Case No. CV 09-2619

AMERICAN BANK'S ERRATA TO  
STATEMENT OF FACTS IN  
OPPOSITION TO ACI'S MOTION FOR  
SUMMARY JUDGMENT

for the RYKER YOUNG REVOCABLE TRUST, MARSHALL CHESROWN a single man, IDAHO ROOFING SPECIALIST, LLC, an Idaho limited liability company, THORCO, INC., an Idaho corporation, CONSOLIDATED SUPPLY COMPANY, an Oregon corporation, INTERSTATE CONCRETE & ASPHALT COMPANY, an Idaho corporation, CONCRETE FINISHING, INC., an Arizona corporation, THE TURF CORPORATION, an Idaho corporation, WADSWORTH GOLF CONSTRUCTION COMPANY OF THE SOUTHWEST, a Delaware corporation, POLIN & YOUNG CONSTRUCTION, INC., an Idaho corporation, TAYLOR ENGINEERING, INC., a Washington corporation, PRECISION IRRIGATION, INC., an Arizona corporation and SPOKANE WILBERT VAULT CO., a Washington corporation, d/b/a WILBERT PRECAST,

Defendants.

American Bank hereby files the following correction to its statement of facts filed on November 16, 2011, in opposition to ACI Northwest, Inc.'s motion for summary judgment. In paragraph 52 of American Bank's statement of facts, American Bank states that a it has been issued a Sheriff's Deed to the property. That is incorrect. American Bank has only been issued the Sheriff's Certificate of Sale that is referenced as the record citation.

DATED this 17th day of November, 2011.

MOFFATT, THOMAS, BARRETT, ROCK &  
FIELDS, CHARTERED

By



C. Clayton Gill - Of the Firm  
Attorneys for Plaintiff

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 17th day of November, 2011, I caused a true and correct copy of the foregoing **AMERICAN BANK'S ERRATA TO STATEMENT OF FACTS IN OPPOSITION TO ACI'S MOTION FOR SUMMARY JUDGMENT** to be served by the method indicated below, and addressed to the following:

John R. Layman  
LAYMAN, LAYMAN & ROBINSON, PLLP  
601 S. Division St.  
Spokane, WA 99202  
Facsimile (509) 624-2902  
*Attorney for Defendants BRN Development,  
BRN Investments, BRN-Lake View Joint  
Venture, Marshall Chesrown, Lake View AG,  
Robert Levin, Trustee For The Roland M.  
Casati Family Trust, Dated June 5, 2008*

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Charles B. Lempcsis  
ATTORNEY AT LAW  
W. 201 Seventh Ave.  
Post Falls, ID 83854  
Facsimile (208) 773-1044  
*Attorney for Defendant Thorco, Inc.*

☐ U.S. Mail, Postage Prepaid  
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Edward J. Anson  
WITHERSPOON, KELLEY, DAVENPORT  
& TOOLE, P.S.  
608 Northwest Blvd. #300  
Coeur d'Alene, ID 83814-2146  
Facsimile (208) 667-8470  
*Attorney for Defendants The Turf Corporation,  
Wadsworth Golf Construction Company of the  
Southwest and Precision Irrigation, Inc.*

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Spokane, WA 99201  
Facsimile (509) 455-7111  
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Facsimile (208) 664-1684  
*Attorneys for Defendant ACI Northwest, Inc.*

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P.O. Box 1336  
Coeur d'Alene, ID 83816-1336  
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*Attorneys for Defendant Ryker Young Revocable Trust*

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C. Clayton Gill



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C. Clayton Gill, ISB No. 4973  
Tyler J. Anderson, ISB No. 6632  
MOFFATT, THOMAS, BARRETT, ROCK &  
FIELDS, CHARTERED  
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250 Northwest Blvd., Suite 107A  
Coeur d'Alene, Idaho 83814  
Telephone (509) 838-6131  
Facsimile (509) 838-1416

Attorneys for Plaintiff

STATE OF IDAHO  
COUNTY OF KOOTENAI } SS  
FILED:

2011 NOV 22 PM 12: 27

CLERK DISTRICT COURT  
*Barclay Thompson*  
DEPUTY

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

AMERICAN BANK, a Montana banking  
corporation,

Plaintiff,

vs.

BRN DEVELOPMENT, INC., an Idaho  
corporation, BRN INVESTMENTS, LLC, an  
Idaho limited liability company, LAKE VIEW  
AG, a Liechtenstein company, BRN-LAKE  
VIEW JOINT VENTURE, an Idaho general  
partnership, ROBERT LEVIN, Trustee for the  
ROLAND M. CASATI FAMILY TRUST,  
dated June 5, 2008, RYKER YOUNG, Trustee

Case No. CV 09-2619

**AFFIDAVIT OF C. CLAYTON GILL IN  
OPPOSITION TO ACI'S MOTION TO  
STRIKE AFFIDAVIT OF KYLE CAPPS**

**AFFIDAVIT OF C. CLAYTON GILL IN OPPOSITION TO  
ACI'S MOTION TO STRIKE AFFIDAVIT OF KYLE CAPPS - 1**

Client:2248295.1

1889

Defendants.

1890

3. Attached hereto as Exhibit B is a true and correct copy of an e-mail chain between me and Kyle Capps dated October 26, 2011, with the exhibits to my e-mail included within Exhibit B to this affidavit.

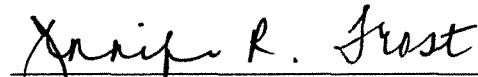
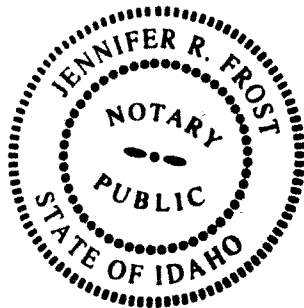
4. Attached hereto as Exhibit C is a true and correct copy of an e-mail chain from Kyle Capps to me dated November 4, 2011, with the exhibit to Mr. Capps' e-mail included within Exhibit C to this affidavit.

Further your affiant sayeth naught.



C. Clayton Gill

SUBSCRIBED AND SWORN to before me this 21<sup>st</sup> day of November, 2011.



NOTARY PUBLIC FOR IDAHO

Residing at Boise, ID

My Commission Expires 7/24/2012

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 21st day of November, 2011, I caused a true and correct copy of the foregoing **AFFIDAVIT OF C. CLAYTON GILL IN OPPOSITION TO ACI'S MOTION TO STRIKE AFFIDAVIT OF KYLE CAPPS** to be served by the method indicated below, and addressed to the following:

John R. Layman  
LAYMAN, LAYMAN & ROBINSON, PLLP  
601 S. Division St.  
Spokane, WA 99202  
Facsimile (509) 624-2902  
*Attorney for Defendants BRN Development,  
BRN Investments, BRN-Lake View Joint  
Venture, Marshall Chesrown, Lake View AG,  
Robert Levin, Trustee For The Roland M.  
Casati Family Trust, Dated June 5, 2008*

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Charles B. Lempesis  
ATTORNEY AT LAW  
W. 201 Seventh Ave.  
Post Falls, ID 83854  
Facsimile (208) 773-1044  
*Attorney for Defendant Thorco, Inc.*

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☒ E-mail

Edward J. Anson  
WITHERSPOON, KELLEY, DAVENPORT  
& TOOLE, P.S.  
608 Northwest Blvd. #300  
Coeur d'Alene, ID 83814-2146  
Facsimile (208) 667-8470  
*Attorney for Defendants The Turf Corporation,  
Wadsworth Golf Construction Company of the  
Southwest and Precision Irrigation, Inc.*

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Richard D. Campbell  
CAMPBELL & BISSELL, PLLC  
7 S. Howard St. #416  
Spokane, WA 99201  
Facsimile (509) 455-7111  
*Attorneys for Defendant Polin & Young  
Construction*

☐ U.S. Mail, Postage Prepaid  
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M. Gregory Embrey  
WITHERSPOON, KELLEY, DAVENPORT &  
TOOLE, P.S.  
608 NW Blvd., Suite 300  
Coeur d'Alene, ID 83814-2174  
Facsimile (208) 667-8470  
*Attorney for Defendant Taylor Engineering, Inc.*

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Steven C. Wetzel  
Kenneth L. Huitt  
JAMES, VERNON & WEEKS, PA  
1626 Lincoln Way  
Coeur d'Alene, ID 83814  
Facsimile (208) 664-1684  
*Attorneys for Defendant ACI Northwest, Inc.*

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Terrance R. Harris  
RAMSDEN & LYONS, LLP  
700 Northwest Blvd.  
P.O. Box 1336  
Coeur d'Alene, ID 83816-1336  
Facsimile (208) 664-5884  
*Attorneys for Receiver*

☐ U.S. Mail, Postage Prepaid  
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☒ E-mail

Douglas S. Marfice  
RAMSDEN & LYONS, LLP  
700 Northwest Blvd.  
P.O. Box 1336  
Coeur d'Alene, ID 83816-1336  
Facsimile (208) 664-5884  
*Attorneys for Defendant Ryker Young Revocable Trust*

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☐ Facsimile  
☒ E-mail



---

C. Clayton Gill

# EXHIBIT A

## Clay Gill

---

**From:** Clay Gill  
**Sent:** Friday, August 19, 2011 10:35 AM  
**To:** kylec@blackrockidaho.com  
**Cc:** John R. Layman  
**Subject:** RE: Permission to speak with Kyle Capps  
**Attachments:** 062909 ltr to Haneke.pdf; ACI00277.pdf; JC Detail.pdf; ACI004173.pdf

Kyle,

Attached are some documents that I would like to chat with you about.

Let me know when you have time to discuss. And thank you again for your time!

Clay Gill  
Moffatt Thomas  
101 S. Capitol Blvd, 10th Floor  
P.O. Box 829  
Boise, Idaho 83702  
(208)385-5478 (direct)  
(208)385-5384 (fax)  
[ccg@moffatt.com](mailto:ccg@moffatt.com) (e-mail)  
[www.moffatt.com](http://www.moffatt.com) (website)

---

**From:** John R. Layman [mailto:JRLayman@laymanlawfirm.com]  
**Sent:** Thursday, August 18, 2011 7:46 PM  
**To:** Clay Gill  
**Cc:** kylec@blackrockidaho.com  
**Subject:** Re: Permission to speak with Kyle Capps

ok with me. I left voice message for Kyle that you might be calling. don't get him inconsistent w his deposition.

Thanks.

Sent from my iPad

On Aug 18, 2011, at 2:47 PM, "Clay Gill" <[CCG@moffatt.com](mailto:CCG@moffatt.com)> wrote:

Hi John,

Is it OK for me to call Kyle Capps directly? I would like to work up an affidavit of Kyle that supports the facts in the attached letter from Kathryn McKinley.

Let me know if that is acceptable to you.

Thx

Clay Gill  
Moffatt Thomas

101 S. Capitol Blvd, 10th Floor  
P.O. Box 829  
Boise, Idaho 83702  
(208)385-5478 (direct)  
(208)385-5384 (fax)  
[ccg@moffatt.com](mailto:ccg@moffatt.com) (e-mail)  
[www.moffatt.com](http://www.moffatt.com) (website)

---

NOTICE: This e-mail, including attachments, constitutes a confidential attorney-client communication. It is not intended for transmission to, or receipt by, any unauthorized persons. If you have received this communication in error, do not read it. Please delete it from your system without copying it, and notify the sender by reply e-mail or by calling (208) 345-2000, so that our address record can be corrected. Thank you.

NOTICE: To comply with certain U.S. Treasury regulations, we inform you that, unless expressly stated otherwise, any U.S. federal tax advice contained in this e-mail, including attachments, is not intended or written to be used, and cannot be used, by any person for the purpose of avoiding any penalties that may be imposed by the Internal Revenue Service.

<Ltr to Jim Haneke at ACI 062909.pdf>





**WOLKEY MCKINLEY**  
ATTORNEYS AT LAW

Michelle K. Wolkey\*  
Kathryn R. McKinley\*  
Matthew C. Albrecht  
L. Diane Emmons, OF COUNSEL  
\* Also admitted in Idaho

June 29, 2009

Jim Haneke  
President  
ACI Northwest, Inc.  
6600 N. Government Way  
Coeur d'Alene, ID 93815

Re: ACI Claim of Lien on Black Rock North  
Recording Date: June 15, 2009  
Instrument No.: 2216696000  
Our Client: BRN Development, Inc.  
Our File No.: CHM01/50

Dear Mr. Haneke:

This firm represents BRN Development, Inc. ("BRN") with respect to the above referenced Claim of Lien. The purpose of this letter is to demand that the Claim of Lien recorded by ACI Northwest, Inc. ("ACI") be released immediately. The lien is invalid on its face and was filed on false premises and by a false swearing.

The amounts claimed on ACI's lien are purportedly for work done under a contract entered into between Apex Construction, Inc., a predecessor corporation of ACI, and BRN (the "Contract") for work on Black Rock North (the "Project"). Although it appears that ACI has performed the work that has been done under the Contract, no substantive work has been performed on the Project since December 2008. at the latest. Even ACI's own schedule attached to the Claim of Lien acknowledges that fact. There are no amounts claimed by ACI in its lien for work done after December 10, 2008. Although ACI's Claim of Lien states that it last performed work on March 17, 2009, the lien does not include that work and is, therefore, invalid.

Further, the work that ACI purportedly performed in March 2009 was trivial maintenance related to erosion control. One of ACI's officers, Bill Radobenko, admitted in writing in January 2009, that ACI was not under any agreement to maintain the erosion control. The erosion control was not necessary to move the Project forward. It was simply maintenance and inspection. ACI was specifically instructed in the Fall of 2008 to

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Jim Haneke  
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Page 2

discontinue work on the Project. Pursuant to the Contract, the contractor was required to suspend work upon notice from BRN. That notice was given to ACI and it was not authorized to perform any additional work on the Project. Clearly any work done in March, even if separately authorized, was not part of the Project, was trivial and cannot be used to revive the time for filing a lien for work done prior to December 10, 2008.

Interestingly, ACI did not submit an invoice to BRN Development, Inc. for the March work until this month. That invoice shows no work done on March 17 and only 2 hours of supervisory time on March 16, 2009. As a result, any claim of lien that ACI was entitled to file related to the March work needed to be filed not later than June 14, 2009. ACI did not, however, file a lien for the March work, and the time for filing a lien for its prior work has expired.

Because of the foregoing facts, ACI's lien is patently invalid and without basis. The facts that ACI's agent has sworn to be true are not, and ACI knew when it filed the lien that they were not true. The Claim of Lien was filed in bad faith, and BRN demands that ACI release its lien immediately.

As to the dollar amount stated in ACI's lien, it includes more than \$1,000,000 for a bonus. Pursuant to the Contract, there may have been potential for a bonus upon completion of the contracted work. At that time, if the final contract sum owing to Aapex was less than the contract amount of \$7,500,000, Aapex was to share in any cost savings. For several reasons, ACI is not entitled to any amount of bonus. First, the Contract has not been completed. ACI appears to be trying to compare partial completion dollars to final contract dollars. This is clearly not what was contemplated in the Contract, and there is no bonus of any amount owing. Second, the contracting party was Aapex, which it turns out was not at the time of contract, and is not now, a registered contractor in the state of Idaho. Under Idaho law, an unregistered contractor may not file a claim of lien. ACI is not in contractual privity with BRN and is not entitled to any bonus of any kind.

Even if ACI were entitled to a bonus under the Contract, this is not a valid basis for a mechanic's or materialman's lien. The intent of the lien statute is to provide recourse to those who have provided labor and/or materials to a project to allow them to be compensated for the labor and/or materials. It is not the intent of the statute to allow a party to claim a lien for other non-labor and non-materials components of a contract, thereby prejudicing other providers of labor and materials. The bonus comprises approximately 2/3 of ACI's lien. Under Idaho law, when a lien claim greatly exceeds the amount of actual labor performed or materials provided, and is not made in good faith, the entire lien may be invalidated. We believe the ACI lien falls within this category.

If we have not received proof of release of ACI's lien by 5:00 p.m. on July 6, 2009, BRN intends to pursue all legal remedies available to it in this matter and will seek attorneys' fees and costs incurred in doing so. Proof of release must be sent to me at my Spokane office.

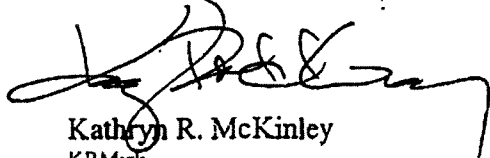
Jim Haneke  
June 29, 2009  
Page 3

By this letter ACI and its affiliates, officers, directors, employees and agents are put on notice that they are not to access the Black Rock North property for any reason without the consent of the property owner. Further, nothing is to be removed from the property without the knowledge and consent of the property owner. Failure to comply with this requirement will be considered to be a trespass.

If you would like to discuss this matter, please call me at my Spokane office. I look forward to receiving the release of lien by July 6, 2009.

Sincerely,

~~WOLKEY~~ McKINLEY, P.S.

A handwritten signature in black ink, appearing to read 'KRM', with a long horizontal flourish extending to the right.

Kathryn R. McKinley  
KRM:rk  
cc: BRN Development, Inc.



6600 N. GOVERNMENT WAY  
COEUR D' ALENE, ID 83815  
208-777-8013 Phone  
208-777-8667 Fax

## INVOICE

To: BLACK ROCK DEVELOPMENT INC	Invoice: 7093
P.O. BOX 3070	Invoice Date: 04/07/09
COEUR D.ALENE, ID 83816	Due Date: 05/10/09
Contract: 9914- BRN STORM PIPE DIVERSION	Disc Date:

SHOULD HAVE BEEN BILLED TO BLACK ROCK NORTH-RESENT INVOICE FROM WORD WITH NAME CHANGE ON 6-3-09.

### 5150. EROSION CONTROL MATERIALS

LUNCEFORD FARMS INC

		03/05/09	Inv#	1238	274.28
Total		MATERIALS			274.28
LABOR					
Truck Driver	HOURLY	03/06/09	5.00 HRS @	37.00	185.00
Superintendent	HOURLY	03/05/09	8.00 HRS @	60.00	480.00
Superintendent	HOURLY	03/06/09	5.00 HRS @	60.00	300.00
Superintendent	HOURLY	03/16/09	2.00 HRS @	60.00	120.00
Operator	HOURLY	03/05/09	8.00 HRS @	37.00	296.00
Operator	HOURLY	03/06/09	4.00 HRS @	37.00	148.00
Operator	HOURLY	03/05/09	8.00 HRS @	37.00	296.00
Operator	HOURLY	03/06/09	8.00 HRS @	37.00	296.00
Total		LABOR			2,121.00
EQUIPMENT					
015-101 CAD TRUCK -SOLD	Code: 1	03/06/09	5.00 HRS	84.00	420.00
040-206 2006 JOHN DEERE 650J DOZER-SOLD	Code: 1	03/05/09	5.00 HRS	88.00	440.00
Total		EQUIPMENT			860.00
		Total For 5150.			3,255.28
		Invoice Sub-Total			3,255.28

#### Summary

5150. EROSION CONTROL			3,255.28
BOND & INSURANCE	3,255.28 @	2.00%	65.11
MARGIN	3,320.39 @	15.00%	498.06
CURRENT DUE :			3,818.45

ACI

000277

1899A

# JC Detail

Jobs: 9914- - 9914-  
All Months

All Phases  
All Dates

All Cost Types  
All JC Transaction Types

Units: Actual  
All Departments

Mth	Trans#	Posted Date	Actual Date	Trans Type	Source	Description	Units	Hours	Cost
9914- BRN STORM PIPE DIVERSION									
5150.					LAB				
03/09	3167	03/11/09	03/05/09	PR	PR Entry	N/O /10168/BOWER , BRIAN L11 FICA-SOCIAL SECURITY	0.000	0.00	10.91
03/09	3168	03/11/09	03/05/09	PR	PR Entry	N/O /10168/BOWER , BRIAN L12 FICA-MEDICARE	0.000	0.00	2.55
03/09	3169	03/11/09	03/05/09	PR	PR Entry	N/O /10168/BOWER , BRIAN L13 FUTA	0.000	0.00	1.41
03/09	3170	03/11/09	03/05/09	PR	PR Entry	N/O /10168/BOWER , BRIAN L18 GENERAL LIABILITY INSURANCE	0.000	0.00	4.38
03/09	3171	03/11/09	03/05/09	PR	PR Entry	N/O /10168/BOWER , BRIAN L21 SUTA-IDAHO	0.000	0.00	7.35
03/09	3172	03/11/09	03/05/09	PR	PR Entry	N/O /10168/BOWER , BRIAN L22 ID WORKERS COMPENSATION	0.000	0.00	7.86
03/09	3173	03/11/09	03/05/09	PR	PR Entry	N/O /10168/BOWER , BRIAN L23 Vacation Payable	0.000	0.00	3.60
03/09	3174	03/11/09	03/05/09	PR	PR Entry	N/O /10168/BOWER , BRIAN L24 Holiday Payable	0.000	0.00	3.60
03/09	3175	03/11/09	03/05/09	PR	PR Entry	N/O /10168/BOWER , BRIAN L25 SAFETY BURDEN	0.000	0.00	1.60
03/09	3176	03/11/09	03/05/09	PR	PR Entry	N/O /10168/BOWER , BRIAN L51 H/A INSUR PREMIUM-EMP	0.000	0.00	12.88
03/09	3177	03/11/09	03/05/09	PR	PR Entry	N/O /168/CHAVEZ , EUGENE 11 FICA-SOCIAL SECURITY	0.000	0.00	12.40
03/09	3178	03/11/09	03/05/09	PR	PR Entry	N/O /168/CHAVEZ , EUGENE 12 FICA-MEDICARE	0.000	0.00	2.90
03/09	3179	03/11/09	03/05/09	PR	PR Entry	N/O /168/CHAVEZ , EUGENE 18 GENERAL LIABILITY INSURANCE	0.000	0.00	4.98
03/09	3180	03/11/09	03/05/09	PR	PR Entry	N/O /168/CHAVEZ , EUGENE 21 SUTA-IDAHO	0.000	0.00	8.35
03/09	3181	03/11/09	03/05/09	PR	PR Entry	N/O /168/CHAVEZ , EUGENE 22 ID WORKERS COMPENSATION	0.000	0.00	8.94
03/09	3182	03/11/09	03/05/09	PR	PR Entry	N/O /168/CHAVEZ , EUGENE 23 Vacation Payable	0.000	0.00	3.60
03/09	3183	03/11/09	03/05/09	PR	PR Entry	N/O /168/CHAVEZ , EUGENE 24 Holiday Payable	0.000	0.00	3.60
03/09	3184	03/11/09	03/05/09	PR	PR Entry	N/O /168/CHAVEZ , EUGENE 25 SAFETY BURDEN	0.000	0.00	1.60
03/09	3185	03/11/09	03/05/09	PR	PR Entry	N/O /168/CHAVEZ , EUGENE 51 H/A INSUR PREMIUM-EMP	0.000	0.00	12.88
03/09	3186	03/11/09	03/05/09	PR	PR Entry	N/S /101/ROBERGE , LAWRENCE J11 FICA-SOCIAL SECURITY	0.000	0.00	13.39
03/09	3187	03/11/09	03/05/09	PR	PR Entry	N/S /101/ROBERGE , LAWRENCE J12 FICA-MEDICARE	0.000	0.00	3.13
03/09	3188	03/11/09	03/05/09	PR	PR Entry	N/S /101/ROBERGE , LAWRENCE J18 GENERAL LIABILITY INSURANCE	0.000	0.00	5.38
03/09	3189	03/11/09	03/05/09	PR	PR Entry	N/S /101/ROBERGE , LAWRENCE J21 SUTA-IDAHO	0.000	0.00	9.02
03/09	3190	03/11/09	03/05/09	PR	PR Entry	N/S /101/ROBERGE , LAWRENCE J22 ID WORKERS COMPENSATION	0.000	0.00	9.65
03/09	3191	03/11/09	03/05/09	PR	PR Entry	N/S /101/ROBERGE , LAWRENCE J23 Vacation Payable	0.000	0.00	3.60
03/09	3192	03/11/09	03/05/09	PR	PR Entry	N/S /101/ROBERGE , LAWRENCE J24 Holiday Payable	0.000	0.00	3.60
03/09	3193	03/11/09	03/05/09	PR	PR Entry	N/S /101/ROBERGE , LAWRENCE J25 SAFETY BURDEN	0.000	0.00	1.60
03/09	3194	03/11/09	03/05/09	PR	PR Entry	N/S /101/ROBERGE , LAWRENCE J51 H/A INSUR PREMIUM-EMP	0.000	0.00	12.88

# JC Detail

Jobs: 9914-- 9914- All Phases All Cost Types Units: Actual  
All Months All Dates All JC Transaction Types All Departments

Mth	Trans#	Posted Date	Actual Date	Trans Type	Source	Description	Units	Hours	Cost
9914- BRN STORM PIPE DIVERSION - Continued									
03/09	3195	03/11/09	03/06/09	PR	PR Entry	N/O /10168/BOWER , BRIAN L11 FICA-SOCIAL SECURITY	0.000	0.00	10.91
03/09	3196	03/11/09	03/06/09	PR	PR Entry	N/O /10168/BOWER , BRIAN L12 FICA-MEDICARE	0.000	0.00	2.55
03/09	3197	03/11/09	03/06/09	PR	PR Entry	N/O /10168/BOWER , BRIAN L13 FUTA	0.000	0.00	1.41
03/09	3198	03/11/09	03/06/09	PR	PR Entry	N/O /10168/BOWER , BRIAN L18 GENERAL LIABILITY INSURANCE	0.000	0.00	4.38
03/09	3199	03/11/09	03/06/09	PR	PR Entry	N/O /10168/BOWER , BRIAN L21 SUTA-IDAHO	0.000	0.00	7.35
03/09	3200	03/11/09	03/06/09	PR	PR Entry	N/O /10168/BOWER , BRIAN L22 ID WORKERS COMPENSATION	0.000	0.00	7.86
03/09	3201	03/11/09	03/06/09	PR	PR Entry	N/O /10168/BOWER , BRIAN L23 Vacation Payable	0.000	0.00	3.60
03/09	3202	03/11/09	03/06/09	PR	PR Entry	N/O /10168/BOWER , BRIAN L24 Holiday Payable	0.000	0.00	3.60
03/09	3203	03/11/09	03/06/09	PR	PR Entry	N/O /10168/BOWER , BRIAN L25 SAFETY BURDEN	0.000	0.00	1.60
03/09	3204	03/11/09	03/06/09	PR	PR Entry	N/O /10168/BOWER , BRIAN L51 H/A INSUR PREMIUM-EMP	0.000	0.00	12.88
03/09	3205	03/11/09	03/06/09	PR	PR Entry	N/O /168/CHAVEZ , EUGENE 11 FICA-SOCIAL SECURITY	0.000	0.00	6.20
03/09	3206	03/11/09	03/06/09	PR	PR Entry	N/O /168/CHAVEZ , EUGENE 12 FICA-MEDICARE	0.000	0.00	1.45
03/09	3207	03/11/09	03/06/09	PR	PR Entry	N/O /168/CHAVEZ , EUGENE 18 GENERAL LIABILITY INSURANCE	0.000	0.00	2.49
03/09	3208	03/11/09	03/06/09	PR	PR Entry	N/O /168/CHAVEZ , EUGENE 21 SUTA-IDAHO	0.000	0.00	4.18
03/09	3209	03/11/09	03/06/09	PR	PR Entry	N/O /168/CHAVEZ , EUGENE 22 ID WORKERS COMPENSATION	0.000	0.00	4.47
03/09	3210	03/11/09	03/06/09	PR	PR Entry	N/O /168/CHAVEZ , EUGENE 23 Vacation Payable	0.000	0.00	1.80
03/09	3211	03/11/09	03/06/09	PR	PR Entry	N/O /168/CHAVEZ , EUGENE 24 Holiday Payable	0.000	0.00	1.80
03/09	3212	03/11/09	03/06/09	PR	PR Entry	N/O /168/CHAVEZ , EUGENE 25 SAFETY BURDEN	0.000	0.00	0.80
03/09	3213	03/11/09	03/06/09	PR	PR Entry	N/O /168/CHAVEZ , EUGENE 51 H/A INSUR PREMIUM-EMP	0.000	0.00	6.44
03/09	3214	03/11/09	03/06/09	PR	PR Entry	N/S /101/ROBERGE , LAWRENCE J11 FICA-SOCIAL SECURITY	0.000	0.00	8.37
03/09	3215	03/11/09	03/06/09	PR	PR Entry	N/S /101/ROBERGE , LAWRENCE J12 FICA-MEDICARE	0.000	0.00	1.96
03/09	3216	03/11/09	03/06/09	PR	PR Entry	N/S /101/ROBERGE , LAWRENCE J18 GENERAL LIABILITY INSURANCE	0.000	0.00	3.36
03/09	3217	03/11/09	03/06/09	PR	PR Entry	N/S /101/ROBERGE , LAWRENCE J21 SUTA-IDAHO	0.000	0.00	5.64
03/09	3218	03/11/09	03/06/09	PR	PR Entry	N/S /101/ROBERGE , LAWRENCE J22 ID WORKERS COMPENSATION	0.000	0.00	6.03
03/09	3219	03/11/09	03/06/09	PR	PR Entry	N/S /101/ROBERGE , LAWRENCE J23 Vacation Payable	0.000	0.00	2.25
03/09	3220	03/11/09	03/06/09	PR	PR Entry	N/S /101/ROBERGE , LAWRENCE J24 Holiday Payable	0.000	0.00	2.25
03/09	3221	03/11/09	03/06/09	PR	PR Entry	N/S /101/ROBERGE , LAWRENCE J25 SAFETY BURDEN	0.000	0.00	1.00
03/09	3222	03/11/09	03/06/09	PR	PR Entry	N/S /101/ROBERGE , LAWRENCE J51 H/A INSUR PREMIUM-EMP	0.000	0.00	8.00

# JC Detail

Jobs: 9914- - 9914-

All Phases

All Cost Types

Units: Actual

All Months

All Dates

All JC Transaction Types

All Departments

Mth	Trans#	Posted Date	Actual Date	Trans Type	Source	Description	Units	Hours	Cost
9914- BRN STORM PIPE DIVERSION - Continued									
03/09	3223	03/11/09	03/06/09	PR	PR Entry	N/T /14/SCHOONOVER , JARROD 11 FICA-SOCIAL SECURITY	0.000	0.00	8.32
03/09	3224	03/11/09	03/06/09	PR	PR Entry	N/T /14/SCHOONOVER , JARROD 12 FICA-MEDICARE	0.000	0.00	1.95
03/09	3225	03/11/09	03/06/09	PR	PR Entry	N/T /14/SCHOONOVER , JARROD 18 GENERAL LIABILITY INSURANCE	0.000	0.00	2.68
03/09	3226	03/11/09	03/06/09	PR	PR Entry	N/T /14/SCHOONOVER , JARROD 21 SUTA-IDAHO	0.000	0.00	5.61
03/09	3227	03/11/09	03/06/09	PR	PR Entry	N/T /14/SCHOONOVER , JARROD 22 ID WORKERS COMPENSATION	0.000	0.00	4.80
03/09	3228	03/11/09	03/06/09	PR	PR Entry	N/T /14/SCHOONOVER , JARROD 23 Vacation Payable	0.000	0.00	2.21
03/09	3229	03/11/09	03/06/09	PR	PR Entry	N/T /14/SCHOONOVER , JARROD 24 Holiday Payable	0.000	0.00	2.21
03/09	3230	03/11/09	03/06/09	PR	PR Entry	N/T /14/SCHOONOVER , JARROD 25 SAFETY BURDEN	0.000	0.00	1.00
03/09	3231	03/11/09	03/05/09	PR	PR Entry	N/O 1.00/10168/BOWER , BRIAN L1 HOURLY	0.000	8.00	176.00
03/09	3232	03/11/09	03/05/09	PR	PR Entry	N/O 1.00/168/CHAVEZ , EUGENE 1 HOURLY	0.000	8.00	200.00
03/09	3233	03/11/09	03/05/09	PR	PR Entry	N/S 1.00/101/ROBERGE , LAWRENCE J1 HOURLY	0.000	8.00	216.00
03/09	3234	03/11/09	03/06/09	PR	PR Entry	N/O 1.00/10168/BOWER , BRIAN L1 HOURLY	0.000	8.00	176.00
03/09	3235	03/11/09	03/06/09	PR	PR Entry	N/O 1.00/168/CHAVEZ , EUGENE 1 HOURLY	0.000	4.00	100.00
03/09	3236	03/11/09	03/06/09	PR	PR Entry	N/S 1.00/101/ROBERGE , LAWRENCE J1 HOURLY	0.000	5.00	135.00
03/09	3237	03/11/09	03/06/09	PR	PR Entry	N/T 1.00/14/SCHOONOVER , JARROD 1 HOURLY	0.000	2.50	53.75
03/09	3238	03/11/09	03/06/09	PR	PR Entry	N/T 1.50/14/SCHOONOVER , JARROD 1 HOURLY	0.000	2.50	80.63
03/09	16694	03/25/09	03/16/09	PR	PR Entry	N/S /101/ROBERGE , LAWRENCE J11 FICA-SOCIAL SECURITY	0.000	0.00	3.35
03/09	16695	03/25/09	03/16/09	PR	PR Entry	N/S /101/ROBERGE , LAWRENCE J12 FICA-MEDICARE	0.000	0.00	0.78
03/09	16696	03/25/09	03/16/09	PR	PR Entry	N/S /101/ROBERGE , LAWRENCE J18 GENERAL LIABILITY INSURANCE	0.000	0.00	1.35
03/09	16697	03/25/09	03/16/09	PR	PR Entry	N/S /101/ROBERGE , LAWRENCE J21 SUTA-IDAHO	0.000	0.00	2.25
03/09	16698	03/25/09	03/16/09	PR	PR Entry	N/S /101/ROBERGE , LAWRENCE J22 ID WORKERS COMPENSATION	0.000	0.00	2.41
03/09	16699	03/25/09	03/16/09	PR	PR Entry	N/S /101/ROBERGE , LAWRENCE J23 Vacation Payable	0.000	0.00	0.90
03/09	16700	03/25/09	03/16/09	PR	PR Entry	N/S /101/ROBERGE , LAWRENCE J24 Holiday Payable	0.000	0.00	0.90
03/09	16701	03/25/09	03/16/09	PR	PR Entry	N/S /101/ROBERGE , LAWRENCE J25 SAFETY BURDEN	0.000	0.00	0.40
03/09	16702	03/25/09	03/16/09	PR	PR Entry	N/S /101/ROBERGE , LAWRENCE J51 H/A INSUR PREMIUM-EMP	0.000	0.00	3.22
03/09	16703	03/25/09	03/16/09	PR	PR Entry	N/S 1.00/101/ROBERGE , LAWRENCE J1 HOURLY	0.000	2.00	54.00
03/09	29536	04/08/09	03/30/09	PR	PR Entry	N/L /471/FERRO , BRETT A11 FICA-SOCIAL SECURITY	0.000	0.00	8.43
03/09	29537	04/08/09	03/30/09	PR	PR Entry	N/L /471/FERRO , BRETT A12 FICA-MEDICARE	0.000	0.00	1.98
03/09	29538	04/08/09	03/30/09	PR	PR Entry	N/L /471/FERRO , BRETT A13 FUTA	0.000	0.00	1.09

1902 001181

# JC Detail

Jobs: 9914-- 9914- All Phases All Cost Types Units: Actual  
All Months All Dates All JC Transaction Types All Departments

Mth	Trans#	Posted Date	Actual Date	Trans Type	Source	Description	Units	Hours	Cost
<b>9914- BRN STORM PIPE DIVERSION - Continued</b>									
03/09	29539	04/08/09	03/30/09	PR	PR Entry	N/L /471/FERRO , BRETT A18 GENERAL LIABILITY INSURANCE	0.000	0.00	3.39
03/09	29540	04/08/09	03/30/09	PR	PR Entry	N/L /471/FERRO , BRETT A21 SUTA-IDAHO	0.000	0.00	5.88
03/09	29541	04/08/09	03/30/09	PR	PR Entry	N/L /471/FERRO , BRETT A22 ID WORKERS COMPENSATION	0.000	0.00	6.08
03/09	29542	04/08/09	03/30/09	PR	PR Entry	N/L /471/FERRO , BRETT A23 Vacation Payable	0.000	0.00	3.60
03/09	29543	04/08/09	03/30/09	PR	PR Entry	N/L /471/FERRO , BRETT A24 Holiday Payable	0.000	0.00	3.60
03/09	29544	04/08/09	03/30/09	PR	PR Entry	N/L /471/FERRO , BRETT A25 SAFETY BURDEN	0.000	0.00	1.60
03/09	29545	04/08/09	03/30/09	PR	PR Entry	N/L /471/FERRO , BRETT A51 H/A INSUR PREMIUM-EMP	0.000	0.00	12.88
03/09	29546	04/08/09	03/30/09	PR	PR Entry	N/L /594/COBB , JACOB A11 FICA-SOCIAL SECURITY	0.000	0.00	8.69
03/09	29547	04/08/09	03/30/09	PR	PR Entry	N/L /594/COBB , JACOB A12 FICA-MEDICARE	0.000	0.00	2.03
03/09	29548	04/08/09	03/30/09	PR	PR Entry	N/L /594/COBB , JACOB A13 FUTA	0.000	0.00	1.12
03/09	29549	04/08/09	03/30/09	PR	PR Entry	N/L /594/COBB , JACOB A18 GENERAL LIABILITY INSURANCE	0.000	0.00	3.49
03/09	29550	04/08/09	03/30/09	PR	PR Entry	N/L /594/COBB , JACOB A21 SUTA-IDAHO	0.000	0.00	5.84
03/09	29551	04/08/09	03/30/09	PR	PR Entry	N/L /594/COBB , JACOB A22 ID WORKERS COMPENSATION	0.000	0.00	6.26
03/09	29552	04/08/09	03/30/09	PR	PR Entry	N/L /594/COBB , JACOB A23 Vacation Payable	0.000	0.00	3.60
03/09	29553	04/08/09	03/30/09	PR	PR Entry	N/L /594/COBB , JACOB A24 Holiday Payable	0.000	0.00	3.60
03/09	29554	04/08/09	03/30/09	PR	PR Entry	N/L /594/COBB , JACOB A25 SAFETY BURDEN	0.000	0.00	1.60
03/09	29555	04/08/09	03/30/09	PR	PR Entry	N/L /594/COBB , JACOB A51 H/A INSUR PREMIUM-EMP	0.000	0.00	12.88
03/09	29556	04/08/09	03/30/09	PR	PR Entry	N/L 1.00/471/FERRO , BRETT A1 HOURLY	0.000	8.00	136.00
03/09	29557	04/08/09	03/30/09	PR	PR Entry	N/L 1.00/594/COBB , JACOB A1 HOURLY	0.000	8.00	140.00
						<b>Total for Cost Type: 1</b>	<b>0.000</b>	<b>64.00</b>	<b>1,911.48</b>
<b>5150.</b>						<b>EROSION CONTROL 2 MAT</b>			
12/09	25039	01/11/10	12/31/09	AP	AP Entry	1070 LUNCEFORD FARMS INC 657408 / TR# 1049/3/ APCo: 1/ PO#-Line 9914-01 -1BIG BALES	0.000	0.00	225.00
						<b>Total for Cost Type: 2</b>	<b>0.000</b>	<b>0.00</b>	<b>225.00</b>
<b>5150.</b>						<b>EROSION CONTROL 4 EQ</b>			
03/09	3239	03/11/09	03/05/09	PR	PR Entry	N/O /168/CHAVEZ , EUGENE 340-206 /2006 JOHN DEERE 650J DOZER- SOLD/1	0.000	5.00	225.30
03/09	3240	03/11/09	03/06/09	PR	PR Entry	N/T /14/SCHOONOVER , JARROD 015-101 /CAD TRUCK -SOLD/1	0.000	5.00	512.05
						<b>Total for Cost Type: 4</b>	<b>0.000</b>	<b>10.00</b>	<b>737.35</b>
						<b>Total For Phase: 5150.</b>		<b>74.00</b>	<b>2,873.83</b>
						<b>Total For Job: 9914-</b>		<b>74.00</b>	<b>2,873.83</b>
						<b>Total For Company:1</b>		<b>74.00</b>	<b>2,873.83</b>



**Scott Foster**

---

**From:** Kyle Capps [kylec@blackrockdevelopment.com] **Sent:** Mon 1/12/2009 7:09 AM  
**To:** Bill Radobenko  
**Cc:** Jim Haneke; Marshall Chesrown; Scott Foster  
**Subject:** RE: Emailing: 08-12-29 EPA Letter reg BlkRk North.tif  
**Attachments:**

Thursday is fine with me, let me know a time.

---

**From:** Bill Radobenko [mailto:bjckrado@roadrunner.com]  
**Sent:** Saturday, January 10, 2009 2:55 PM  
**To:** Kyle Capps  
**Cc:** Kyle Capps; 'Jim Haneke'; Marshall Chesrown; 'Scott Foster'  
**Subject:** Emailing: 08-12-29 EPA Letter.reg BlkRk North.tif

Since we are not under any agreement to maintain the erosion controls this year we would like to arrange a drive through that we can refer to in our response to the EPA.

Let me know If Thursday works for you.

Tks

Bill

ACI 004173 7904

# EXHIBIT B

**Clay Gill**

---

**From:** Clay Gill  
**Sent:** Wednesday, October 26, 2011 2:54 PM  
**To:** kylec@blackrockidaho.com  
**Cc:** John R. Layman  
**Subject:** Draft Affidavit of Kyle Capps.DOC  
**Attachments:** 2224752\_1\_Affidavit of Kyle Capps.DOC; Capps Affidavit.pdf

Hi Kyle,

Attached is an affidavit for your review and consideration (the PDF has the exhibits). This pertains to our discussion last August on the erosion control work that ACI conducted in March of 2009 on the Black Rock North project. Affidavits are testimony under oath, just as though you were testifying at a trial before a judge or jury. So make sure it is accurate before you sign it. I sent you a word version in case you want to modify the affidavit yourself. If you need to find a notary, you can find one at any local bank or law firm.

Thanks for your assistance Kyle.

Clay Gill  
Moffatt Thomas  
101 S. Capitol Blvd, 10th Floor  
P.O. Box 829  
Boise, Idaho 83702  
(208)385-5478 (direct)  
(208)385-5384 (fax)  
[ccg@moffatt.com](mailto:ccg@moffatt.com) (e-mail)  
[www.moffatt.com](http://www.moffatt.com) (website)

Randall A. Peterman, ISB No. 1944  
C. Clayton Gill, ISB No. 4973  
Tyler J. Anderson, ISB No. 6632  
MOFFATT, THOMAS, BARRETT, ROCK &  
FIELDS, CHARTERED  
101 S. Capitol Blvd., 10th Floor  
Post Office Box 829  
Boise, Idaho 83701  
Telephone (208) 345-2000  
Facsimile (208) 385-5384  
rap@moffatt.com  
ccg@moffatt.com  
tya@moffatt.com  
23690.0022

Nancy L. Isserlis, ISB No. 7331  
Elizabeth A. Tellessen, ISB No. 7393  
WINSTON & CASHATT  
250 Northwest Blvd., Suite 107A  
Coeur d'Alene, Idaho 83814  
Telephone (509) 838-6131  
Facsimile (509) 838-1416

Attorneys for Plaintiff

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

AMERICAN BANK, a Montana banking  
corporation,

Plaintiff,

vs.

BRN DEVELOPMENT, INC., an Idaho  
corporation, BRN INVESTMENTS, LLC, an  
Idaho limited liability company, LAKE VIEW  
AG, a Liechtenstein company, BRN-LAKE  
VIEW JOINT VENTURE, an Idaho general  
partnership, ROBERT LEVIN, Trustee for the  
ROLAND M. CASATI FAMILY TRUST,  
dated June 5, 2008, RYKER YOUNG, Trustee  
for the RYKER YOUNG REVOCABLE

Case No. CV 09-2619

**AFFIDAVIT OF KYLE CAPPS**

TRUST, MARSHALL CHESROWN a single man, IDAHO ROOFING SPECIALIST, LLC, an Idaho limited liability company, THORCO, INC., an Idaho corporation, CONSOLIDATED SUPPLY COMPANY, an Oregon corporation, INTERSTATE CONCRETE & ASPHALT COMPANY, an Idaho corporation, CONCRETE FINISHING, INC., an Arizona corporation, THE TURF CORPORATION, an Idaho corporation, WADSWORTH GOLF CONSTRUCTION COMPANY OF THE SOUTHWEST, a Delaware corporation, POLIN & YOUNG CONSTRUCTION, INC., an Idaho corporation, TAYLOR ENGINEERING, INC., a Washington corporation, PRECISION IRRIGATION, INC., an Arizona corporation and SPOKANE WILBERT VAULT CO., a Washington corporation, d/b/a WILBERT PRECAST,

Defendants.

STATE OF IDAHO                    )  
  ) ss.  
County of KOOTENAI            )

KYLE CAPPS, having been duly sworn upon oath, deposes and states as follows:

1. I am over the age of eighteen years and make this affidavit upon my own personal knowledge.

2. During the year 2006 up through 2010, I was BRN Development, Inc.'s ("BRN") owner representative and project manager for the development and construction of the Black Rock North golf course and proposed surrounding residential development. As BRN's owner representative and project managers for the Black Rock North project during those years, I was the person at BRN who was responsible for telling the contractors when they were authorized to commence work on the project and when they were to stop all work on the project.

By the end of 2008, BRN was experiencing some financial problems. Because of those financial problems, I instructed all contractors, including ACI Northwest, Inc. ("ACI"), to cease all work until I provided further notice that they could re-commence work.

3. Attached hereto as Exhibit A is an invoice number 7093 that ACI sent to Black Rock Development Inc., on or about April 7, 2009, apparently for erosion control work on the Black Rock North project. I never authorized ACI to perform this work on the Black Rock North project or any other work on the Black Rock North project in the year 2009. Further, ACI's executive manager Bill Radobenko acknowledged to me in writing on January 10, 2009, that ACI was not under agreement to maintain erosion control measures in the year 2009 for the Black Rock North project. *See* Exhibit B attached hereto. Notwithstanding, and without my authorization, ACI apparently provided some erosion control measures to the Black Rock North project in March of 2009.

4. On June 29, 2009, BRN's attorney Kathryn R. McKilney wrote a letter to ACI's President Jim Haneke to advise ACI of BRN's position that BRN did not owe anything for ACI's invoice 7093, as BRN never authorized that work. A true and correct copy of Ms. McKinley's correspondence to ACI is attached hereto as Exhibit C. Ms. McKinley's letter correctly states BRN's position that BRN never authorized ACI to perform any work on the Black Rock North project in the year 2009 and that as a result, BRN owes nothing to ACI for any labor, services, material, or equipment that ACI furnished or supplied to the Black Rock North project in the year 2009, including those items that ACI includes in its invoice 7093.

Further your affiant sayeth naught.

---

Kyle Capps

SUBSCRIBED AND SWORN to before me this \_\_\_\_\_ day of October, 2011.

\_\_\_\_\_  
NOTARY PUBLIC FOR IDAHO

Residing at \_\_\_\_\_

My Commission Expires \_\_\_\_\_

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this \_\_\_\_\_ day of October, 2011, I caused a true and correct copy of the foregoing **AFFIDAVIT OF KYLE CAPPS** to be served by the method indicated below, and addressed to the following:

John R. Layman  
LAYMAN, LAYMAN & ROBINSON, PLLP  
601 S. Division St.  
Spokane, WA 99202  
Facsimile (509) 624-2902  
*Attorney for Defendants BRN Development,  
BRN Investments, BRN-Lake View Joint  
Venture, Marshall Chesrown, Lake View AG,  
Robert Levin, Trustee For The Roland M.  
Casati Family Trust, Dated June 5, 2008*

☐ U.S. Mail, Postage Prepaid  
☐ Hand Delivered  
☐ Overnight Mail  
☐ Facsimile  
☐ E-mail

Charles B. Lempesis  
ATTORNEY AT LAW  
W. 201 Seventh Ave.  
Post Falls, ID 83854  
Facsimile (208) 773-1044  
*Attorney for Defendant Thorco, Inc.*

☐ U.S. Mail, Postage Prepaid  
☐ Hand Delivered  
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☐ Facsimile  
☐ E-mail

Edward J. Anson  
WITHERSPOON, KELLEY, DAVENPORT  
& TOOLE, P.S.  
608 Northwest Blvd. #300  
Coeur d'Alene, ID 83814-2146  
Facsimile (208) 667-8470  
*Attorney for Defendants The Turf Corporation,  
Wadsworth Golf Construction Company of the  
Southwest and Precision Irrigation, Inc.*

☐ U.S. Mail, Postage Prepaid  
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Richard D. Campbell  
CAMPBELL & BISSELL, PLLC  
7 S. Howard St. #416  
Spokane, WA 99201  
Facsimile (509) 455-7111  
*Attorneys for Defendant Polin & Young  
Construction*

☐ U.S. Mail, Postage Prepaid  
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M. Gregory Embrey  
WITHERSPOON, KELLEY, DAVENPORT &  
TOOLE, P.S.  
608 NW Blvd., Suite 300  
Coeur d'Alene, ID 83814-2174  
Facsimile (208) 667-8470  
*Attorney for Defendant Taylor Engineering, Inc.*

☐ U.S. Mail, Postage Prepaid  
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☐ E-mail

Steven C. Wetzel  
Kenneth L. Huitt  
JAMES, VERNON & WEEKS, PA  
1626 Lincoln Way  
Coeur d'Alene, ID 83814  
Facsimile (208) 664-1684  
*Attorneys for Defendant ACI Northwest, Inc.*

☐ U.S. Mail, Postage Prepaid  
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☐ E-mail

Maggie Y. Lyons, Receiver  
RESOLVE FINANCIAL GROUP  
P.O. Box 598  
Hayden, ID 83835

☐ U.S. Mail, Postage Prepaid  
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Terrance R. Harris  
RAMSDEN & LYONS, LLP  
700 Northwest Blvd.  
P.O. Box 1336  
Coeur d'Alene, ID 83816-1336  
*Attorneys for Receiver*

☐ U.S. Mail, Postage Prepaid  
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Douglas S. Marfice  
RAMSDEN & LYONS, LLP  
700 Northwest Blvd.  
P.O. Box 1336  
Coeur d'Alene, ID 83816-1336  
*Attorneys for Defendant Ryker Young Revocable Trust*

☐ U.S. Mail, Postage Prepaid  
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---

C. Clayton Gill

Randall A. Peterman, ISB No. 1944  
C. Clayton Gill, ISB No. 4973  
Tyler J. Anderson, ISB No. 6632  
MOFFATT, THOMAS, BARRETT, ROCK &  
FIELDS, CHARTERED  
101 S. Capitol Blvd., 10th Floor  
Post Office Box 829  
Boise, Idaho 83701  
Telephone (208) 345-2000  
Facsimile (208) 385-5384  
rap@moffatt.com  
ccg@moffatt.com  
tya@moffatt.com  
23690.0022

Nancy L. Isserlis, ISB No. 7331  
Elizabeth A. Tellessen, ISB No. 7393  
WINSTON & CASHATT  
250 Northwest Blvd., Suite 107A  
Coeur d'Alene, Idaho 83814  
Telephone (509) 838-6131  
Facsimile (509) 838-1416

Attorneys for Plaintiff

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

AMERICAN BANK, a Montana banking  
corporation,

Plaintiff,

vs.

BRN DEVELOPMENT, INC., an Idaho  
corporation, BRN INVESTMENTS, LLC, an  
Idaho limited liability company, LAKE VIEW  
AG, a Liechtenstein company, BRN-LAKE  
VIEW JOINT VENTURE, an Idaho general  
partnership, ROBERT LEVIN, Trustee for the  
ROLAND M. CASATI FAMILY TRUST,  
dated June 5, 2008, RYKER YOUNG, Trustee  
for the RYKER YOUNG REVOCABLE

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TRUST, MARSHALL CHESROWN a single man, IDAHO ROOFING SPECIALIST, LLC, an Idaho limited liability company, THORCO, INC., an Idaho corporation, CONSOLIDATED SUPPLY COMPANY, an Oregon corporation, INTERSTATE CONCRETE & ASPHALT COMPANY, an Idaho corporation, CONCRETE FINISHING, INC., an Arizona corporation, THE TURF CORPORATION, an Idaho corporation, WADSWORTH GOLF CONSTRUCTION COMPANY OF THE SOUTHWEST, a Delaware corporation, POLIN & YOUNG CONSTRUCTION, INC., an Idaho corporation, TAYLOR ENGINEERING, INC., a Washington corporation, PRECISION IRRIGATION, INC., an Arizona corporation and SPOKANE WILBERT VAULT CO., a Washington corporation, d/b/a WILBERT PRECAST,

Defendants.

STATE OF IDAHO            )  
                                      ) ss.  
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KYLE CAPPS, having been duly sworn upon oath, deposes and states as follows:

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Further your affiant sayeth naught.

---

Kyle Capps

SUBSCRIBED AND SWORN to before me this \_\_\_\_\_ day of October, 2011.

\_\_\_\_\_  
NOTARY PUBLIC FOR IDAHO

Residing at \_\_\_\_\_

My Commission Expires \_\_\_\_\_

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Spokane, WA 99202  
Facsimile (509) 624-2902  
*Attorney for Defendants BRN Development,  
BRN Investments, BRN-Lake View Joint  
Venture, Marshall Chesrown, Lake View AG,  
Robert Levin, Trustee For The Roland M.  
Casati Family Trust, Dated June 5, 2008*

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Charles B. Lempesis  
ATTORNEY AT LAW  
W. 201 Seventh Ave.  
Post Falls, ID 83854  
Facsimile (208) 773-1044  
*Attorney for Defendant Thorco, Inc.*

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Facsimile (208) 667-8470  
*Attorney for Defendants The Turf Corporation,  
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Spokane, WA 99201  
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*Attorneys for Defendant Polin & Young  
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WITHERSPOON, KELLEY, DAVENPORT &  
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608 NW Blvd., Suite 300  
Coeur d'Alene, ID 83814-2174  
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*Attorney for Defendant Taylor Engineering, Inc.*

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Steven C. Wetzel  
Kenneth L. Huitt  
JAMES, VERNON & WEEKS, PA  
1626 Lincoln Way  
Coeur d'Alene, ID 83814  
Facsimile (208) 664-1684  
*Attorneys for Defendant ACI Northwest, Inc.*

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RAMSDEN & LYONS, LLP  
700 Northwest Blvd.  
P.O. Box 1336  
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*Attorneys for Receiver*

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Douglas S. Marfice  
RAMSDEN & LYONS, LLP  
700 Northwest Blvd.  
P.O. Box 1336  
Coeur d'Alene, ID 83816-1336  
*Attorneys for Defendant Ryker Young Revocable Trust*

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---

C. Clayton Gill

# EXHIBIT A





# EXHIBIT B

**Scott Foster**

---

**From:** Kyle Capps [kylec@blackrockdevelopment.com] **Sent:** Mon 1/12/2009 7:09 AM  
**To:** Bill Radobenko  
**cc:** Jim Haneke; Marshall Chesrown; Scott Foster  
**Subject:** RE: Emailing: 08-12-29 EPA Letter reg BlkRk North.tif  
**Attachments:**

Thursday is fine with me, let me know a time.

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**From:** Bill Radobenko [mailto:bjckrado@roadrunner.com]  
**Sent:** Saturday, January 10, 2009 2:55 PM  
**To:** Kyle Capps  
**Cc:** Kyle Capps; 'Jim Haneke'; Marshall Chesrown; 'Scott Foster'  
**Subject:** Emailing: 08-12-29 EPA Letter.reg BlkRk North.tif

Since we are not under any agreement to maintain the erosion controls this year we would like to arrange a drive through that we can refer to in our response to the EPA.

Let me know if Thursday works for you.

Tks

Bill

EXHIBIT

844

FOSTER 1/23/11

ACI 004173

1922

# EXHIBIT C

1923



**Wolkey McKinley**  
ATTORNEYS AT LAW

Michelle K. Wolkey  
Kathryn R. McKinley  
Matthew C. Albrecht  
L. Diane Emmons, OF COUNSEL  
\* Also admitted in Idaho

June 29, 2009

Jim Haneke  
President  
ACI Northwest, Inc.  
6600 N. Government Way  
Coeur d'Alene, ID 93815

Re: ACI Claim of Lien on Black Rock North  
Recording Date: June 15, 2009  
Instrument No.: 2216696000  
Our Client: BRN Development, Inc.  
Our File No.: CHM01/50

Dear Mr. Haneke:

This firm represents BRN Development, Inc. ("BRN") with respect to the above referenced Claim of Lien. The purpose of this letter is to demand that the Claim of Lien recorded by ACI Northwest, Inc. ("ACI") be released immediately. The lien is invalid on its face and was filed on false premises and by a false swearing.

The amounts claimed on ACI's lien are purportedly for work done under a contract entered into between Apex Construction, Inc., a predecessor corporation of ACI, and BRN (the "Contract") for work on Black Rock North (the "Project"). Although it appears that ACI has performed the work that has been done under the Contract, no substantive work has been performed on the Project since December 2008, at the latest. Even ACI's own schedule attached to the Claim of Lien acknowledges that fact. There are no amounts claimed by ACI in its lien for work done after December 10, 2008. Although ACI's Claim of Lien states that it last performed work on March 17, 2009, the lien does not include that work and is, therefore, invalid.

Further, the work that ACI purportedly performed in March 2009 was trivial maintenance related to erosion control. One of ACI's officers, Bill Radobenko, admitted in writing in January 2009, that ACI was not under any agreement to maintain the erosion control. The erosion control was not necessary to move the Project forward. It was simply maintenance and inspection. ACI was specifically instructed in the Fall of 2008 to

EXHIBIT

843

Foster 912311

1924

Jim Haneke  
June 29, 2009  
Page 2

discontinue work on the Project. Pursuant to the Contract, the contractor was required to suspend work upon notice from BRN. That notice was given to ACI and it was not authorized to perform any additional work on the Project. Clearly any work done in March, even if separately authorized, was not part of the Project, was trivial and cannot be used to revive the time for filing a lien for work done prior to December 10, 2008.

Interestingly, ACI did not submit an invoice to BRN Development, Inc. for the March work until this month. That invoice shows no work done on March 17 and only 2 hours of supervisory time on March 16, 2009. As a result, any claim of lien that ACI was entitled to file related to the March work needed to be filed not later than June 14, 2009. ACI did not, however, file a lien for the March work, and the time for filing a lien for its prior work has expired.

Because of the foregoing facts, ACI's lien is patently invalid and without basis. The facts that ACI's agent has sworn to be true are not, and ACI knew when it filed the lien that they were not true. The Claim of Lien was filed in bad faith, and BRN demands that ACI release its lien immediately.

As to the dollar amount stated in ACI's lien, it includes more than \$1,000,000 for a bonus. Pursuant to the Contract, there may have been potential for a bonus upon completion of the contracted work. At that time, if the final contract sum owing to Aapex was less than the contract amount of \$7,500,000, Aapex was to share in any cost savings. For several reasons, ACI is not entitled to any amount of bonus. First, the Contract has not been completed. ACI appears to be trying to compare partial completion dollars to final contract dollars. This is clearly not what was contemplated in the Contract, and there is no bonus of any amount owing. Second, the contracting party was Aapex, which it turns out was not at the time of contract, and is not now, a registered contractor in the state of Idaho. Under Idaho law, an unregistered contractor may not file a claim of lien. ACI is not in contractual privity with BRN and is not entitled to any bonus of any kind.

Even if ACI were entitled to a bonus under the Contract, this is not a valid basis for a mechanic's or materialman's lien. The intent of the lien statute is to provide recourse to those who have provided labor and/or materials to a project to allow them to be compensated for the labor and/or materials. It is not the intent of the statute to allow a party to claim a lien for other non-labor and non-materials components of a contract, thereby prejudicing other providers of labor and materials. The bonus comprises approximately 2/3 of ACI's lien. Under Idaho law, when a lien claim greatly exceeds the amount of actual labor performed or materials provided, and is not made in good faith, the entire lien may be invalidated. We believe the ACI lien falls within this category.

If we have not received proof of release of ACI's lien by 5:00 p.m. on July 6, 2009, BRN intends to pursue all legal remedies available to it in this matter and will seek attorneys' fees and costs incurred in doing so. Proof of release must be sent to me at my Spokane office.

1925

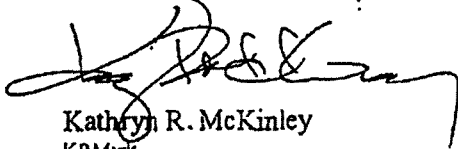
Jim Haneke  
June 29, 2009  
Page 3

By this letter ACI and its affiliates, officers, directors, employees and agents are put on notice that they are not to access the Black Rock North property for any reason without the consent of the property owner. Further, nothing is to be removed from the property without the knowledge and consent of the property owner. Failure to comply with this requirement will be considered to be a trespass.

If you would like to discuss this matter, please call me at my Spokane office. I look forward to receiving the release of lien by July 6, 2009.

Sincerely,

WOLKEY MCKINLEY, P.S.



Kathryn R. McKinley  
KRM:rk  
cc: BRN Development, Inc.

# EXHIBIT C



**Clay Gill**

---

**From:** Kyle Capps [kylec@blackrockidaho.com]  
**Sent:** Friday, November 04, 2011 1:49 PM  
**To:** Clay Gill  
**Cc:** John R. Layman  
**Subject:** RE: Draft Affidavit of Kyle Capps.DOC  
**Attachments:** KC affidavit 110411.pdf

See attached Clay. I corrected a couple of typos, but no other changes.

For any future correspondence to me, you will need to send all emails to [kcapps@fnf.com](mailto:kcapps@fnf.com) and my phone number is now 208-755-9115. Today is my last day employed by The Golf Club at Black Rock.

---

**From:** Clay Gill [mailto:CCG@moffatt.com]  
**Sent:** Tuesday, November 01, 2011 3:43 PM  
**To:** Kyle Capps  
**Cc:** John R. Layman  
**Subject:** FW: Draft Affidavit of Kyle Capps.DOC

Kyle,

Just checking in to see if you have had a chance to review.

I'm happy to make an revisions you deem appropriate. And if it is easier for you to call those into me and have me type the changes, I'm glad to do so

Thx

Clay Gill  
Moffatt Thomas  
101 S. Capitol Blvd, 10th Floor  
P.O. Box 829  
Boise, Idaho 83702  
(208)385-5478 (direct)  
(208)385-5384 (fax)  
[ccg@moffatt.com](mailto:ccg@moffatt.com) (e-mail)  
[www.moffatt.com](http://www.moffatt.com) (website)

---

**From:** Clay Gill  
**Sent:** Wednesday, October 26, 2011 2:54 PM  
**To:** kylec@blackrockidaho.com  
**Cc:** John R. Layman  
**Subject:** Draft Affidavit of Kyle Capps.DOC

Hi Kyle,

Attached is an affidavit for your review and consideration (the PDF has the exhibits). This pertains to our discussion last August on the erosion control work that ACI conducted in March of 2009 on the Black Rock North project. Affidavits are testimony under oath, just as though you were testifying at a trial before a judge or jury. So make sure it is accurate before you sign it. I sent you a word version in case you want to modify the affidavit yourself. If you need to find a notary, you can find one at any local bank or law firm.

11/21/2011

1928

Thanks for your assistance Kyle.

Clay Gill  
Moffatt Thomas  
101 S. Capitol Blvd, 10th Floor  
P.O. Box 829  
Boise, Idaho 83702  
(208)385-5478 (direct)  
(208)385-5384 (fax)  
[ccg@moffatt.com](mailto:ccg@moffatt.com) (e-mail)  
[www.moffatt.com](http://www.moffatt.com) (website)

---

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Randall A. Peterman, ISB No. 1944  
C. Clayton Gill, ISB No. 4973  
Tyler J. Anderson, ISB No. 6632  
MOFFATT, THOMAS, BARRETT, ROCK &  
FIELDS, CHARTERED  
101 S. Capitol Blvd., 10th Floor  
Post Office Box 829  
Boise, Idaho 83701  
Telephone (208) 345-2000  
Facsimile (208) 385-5384  
rap@moffatt.com  
cag@moffatt.com  
tya@moffatt.com  
23690.0022

Nancy L. Isserlis, ISB No. 7331  
Elizabeth A. Tellessen, ISB No. 7393  
WINSTON & CASHATT  
250 Northwest Blvd., Suite 107A  
Coeur d'Alene, Idaho 83814  
Telephone (509) 838-6131  
Facsimile (509) 838-1416

Attorneys for Plaintiff

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

AMERICAN BANK, a Montana banking  
corporation,

Plaintiff,

vs.

BRN DEVELOPMENT, INC., an Idaho  
corporation, BRN INVESTMENTS, LLC, an  
Idaho limited liability company, LAKE VIEW  
AG, a Liechtenstein company, BRN-LAKE  
VIEW JOINT VENTURE, an Idaho general  
partnership, ROBERT LEVIN, Trustee for the  
ROLAND M. CASATI FAMILY TRUST,  
dated June 5, 2008, RYKER YOUNG, Trustee  
for the RYKER YOUNG REVOCABLE

Case No. CV 09-2619

**AFFIDAVIT OF KYLE CAPPS**

TRUST, MARSHALL CHESROWN a single man, IDAHO ROOFING SPECIALIST, LLC, an Idaho limited liability company, THORCO, INC., an Idaho corporation, CONSOLIDATED SUPPLY COMPANY, an Oregon corporation, INTERSTATE CONCRETE & ASPHALT COMPANY, an Idaho corporation, CONCRETE FINISHING, INC., an Arizona corporation, THE TURF CORPORATION, an Idaho corporation, WADSWORTH GOLF CONSTRUCTION COMPANY OF THE SOUTHWEST, a Delaware corporation, POLIN & YOUNG CONSTRUCTION, INC., an Idaho corporation, TAYLOR ENGINEERING, INC., a Washington corporation, PRECISION IRRIGATION, INC., an Arizona corporation and SPOKANE WILBERT VAULT CO., a Washington corporation, d/b/a WILBERT PRECAST,

Defendants.

STATE OF IDAHO            )  
                                      ) ss.  
County of KOOTENAI        )

KYLE CAPPS, having been duly sworn upon oath, deposes and states as follows:

1. I am over the age of eighteen years and make this affidavit upon my own personal knowledge.

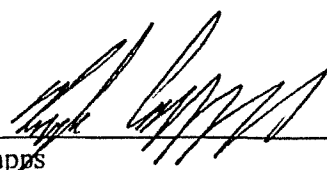
2. During the year 2006 up through 2010, I was BRN Development, Inc.'s ("BRN") owner representative and project manager for the development and construction of the Black Rock North golf course and proposed surrounding residential development. As BRN's owner representative and project manager for the Black Rock North project during those years, I was the person at BRN who was responsible for telling the contractors when they were authorized to commence work on the project and when they were to stop all work on the project.

By the end of 2008, BRN was experiencing some financial problems. Because of those financial problems, I instructed all contractors, including ACI Northwest, Inc. ("ACI"), to cease all work until I provided further notice that they could re-commence work.

3. Attached hereto as Exhibit A is an invoice number 7093 that ACI sent to Black Rock Development Inc., on or about April 7, 2009, apparently for erosion control work on the Black Rock North project. I never authorized ACI to perform this work on the Black Rock North project or any other work on the Black Rock North project in the year 2009. Further, ACI's executive manager Bill Radobenko acknowledged to me in writing on January 10, 2009, that ACI was not under agreement to maintain erosion control measures in the year 2009 for the Black Rock North project. *See Exhibit B attached hereto.* Notwithstanding, and without my authorization, ACI apparently provided some erosion control measures to the Black Rock North project in March of 2009.

4. On June 29, 2009, BRN's attorney Kathryn R. McKinley wrote a letter to ACI's President Jim Haneke to advise ACI of BRN's position that BRN did not owe anything for ACI's invoice 7093, as BRN never authorized that work. A true and correct copy of Ms. McKinley's correspondence to ACI is attached hereto as Exhibit C. Ms. McKinley's letter correctly states BRN's position that BRN never authorized ACI to perform any work on the Black Rock North project in the year 2009 and that as a result, BRN owes nothing to ACI for any labor, services, material, or equipment that ACI furnished or supplied to the Black Rock North project in the year 2009, including those items that ACI includes in its invoice 7093.

Further your affiant sayeth naught.

  
\_\_\_\_\_  
Kyle Capps

SUBSCRIBED AND SWORN to before me this 4<sup>th</sup> day of ~~October~~ <sup>Novem</sup>, 2011.



Gretchen K. Naccarato  
NOTARY PUBLIC FOR IDAHO  
Residing at Kootenai County  
My Commission Expires 7-11-2017

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this \_\_\_\_\_ day of October, 2011, I caused a true and correct copy of the foregoing **AFFIDAVIT OF KYLE CAPPS** to be served by the method indicated below, and addressed to the following:

John R. Layman  
LAYMAN, LAYMAN & ROBINSON, PLLP  
601 S. Division St.  
Spokane, WA 99202  
Facsimile (509) 624-2902  
*Attorney for Defendants BRN Development,  
BRN Investments, BRN-Lake View Joint  
Venture, Marshall Chesrown, Lake View AG,  
Robert Levin, Trustee For The Roland M.  
Casati Family Trust, Dated June 5, 2008*

☐ U.S. Mail, Postage Prepaid  
☐ Hand Delivered  
☐ Overnight Mail  
☐ Facsimile  
☐ E-mail

Charles B. Lempesis  
ATTORNEY AT LAW  
W. 201 Seventh Ave.  
Post Falls, ID 83854  
Facsimile (208) 773-1044  
*Attorney for Defendant Thorco, Inc.*

☐ U.S. Mail, Postage Prepaid  
☐ Hand Delivered  
☐ Overnight Mail  
☐ Facsimile  
☐ E-mail

Edward J. Anson  
WITHERSPOON, KELLEY, DAVENPORT  
& TOOLE, P.S.  
608 Northwest Blvd. #300  
Coeur d'Alene, ID 83814-2146  
Facsimile (208) 667-8470  
*Attorney for Defendants The Turf Corporation,  
Wadsworth Golf Construction Company of the  
Southwest and Precision Irrigation, Inc.*

☐ U.S. Mail, Postage Prepaid  
☐ Hand Delivered  
☐ Overnight Mail  
☐ Facsimile  
☐ E-mail

Richard D. Campbell  
CAMPBELL & BISSELL, PLLC  
7 S. Howard St. #416  
Spokane, WA 99201  
Facsimile (509) 455-7111  
*Attorneys for Defendant Polin & Young  
Construction*

☐ U.S. Mail, Postage Prepaid  
☐ Hand Delivered  
☐ Overnight Mail  
☐ Facsimile  
☐ E-mail

M. Gregory Embrey  
WITHERSPOON, KELLEY, DAVENPORT &  
TOOLE, P.S.  
608 NW Blvd., Suite 300  
Coeur d'Alene, ID 83814-2174  
Facsimile (208) 667-8470  
*Attorney for Defendant Taylor Engineering, Inc.*

☐ U.S. Mail, Postage Prepaid  
☐ Hand Delivered  
☐ Overnight Mail  
☐ Facsimile  
☐ E-mail

Steven C. Wetzel  
Kenneth L. Huitt  
JAMES, VERNON & WEEKS, PA  
1626 Lincoln Way  
Coeur d'Alene, ID 83814  
Facsimile (208) 664-1684  
*Attorneys for Defendant ACI Northwest, Inc.*

☐ U.S. Mail, Postage Prepaid  
☐ Hand Delivered  
☐ Overnight Mail  
☐ Facsimile  
☐ E-mail

Maggie Y. Lyons, Receiver  
RESOLVE FINANCIAL GROUP  
P.O. Box 598  
Hayden, ID 83835

☐ U.S. Mail, Postage Prepaid  
☐ Hand Delivered  
☐ Overnight Mail  
☐ Facsimile  
☐ E-mail

Terrance R. Harris  
RAMSDEN & LYONS, LLP  
700 Northwest Blvd.  
P.O. Box 1336  
Coeur d'Alene, ID 83816-1336  
*Attorneys for Receiver*

☐ U.S. Mail, Postage Prepaid  
☐ Hand Delivered  
☐ Overnight Mail  
☐ Facsimile  
☐ E-mail

Douglas S. Marfice  
RAMSDEN & LYONS, LLP  
700 Northwest Blvd.  
P.O. Box 1336  
Coeur d'Alene, ID 83816-1336  
*Attorneys for Defendant Ryker Young Revocable Trust*

☐ U.S. Mail, Postage Prepaid  
☐ Hand Delivered  
☐ Overnight Mail  
☐ Facsimile  
☐ E-mail

---

C. Clayton Gill



Randall A. Peterman, ISB No. 1944  
C. Clayton Gill, ISB No. 4973  
Tyler J. Anderson, ISB No. 6632  
MOFFATT, THOMAS, BARRETT, ROCK &  
FIELDS, CHARTERED  
101 S. Capitol Blvd., 10th Floor  
Post Office Box 829  
Boise, Idaho 83701  
Telephone (208) 345-2000  
Facsimile (208) 385-5384  
rap@moffatt.com  
ccg@moffatt.com  
tya@moffatt.com  
23690.0022

Nancy L. Isserlis, ISB No. 7331  
Elizabeth A. Tellessen, ISB No. 7393  
WINSTON & CASHATT  
250 Northwest Blvd., Suite 107A  
Coeur d'Alene, Idaho 83814  
Telephone (509) 838-6131  
Facsimile (509) 838-1416

Attorneys for Plaintiff

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

AMERICAN BANK, a Montana banking  
corporation,

Plaintiff,

vs.

BRN DEVELOPMENT, INC., an Idaho  
corporation, BRN INVESTMENTS, LLC, an  
Idaho limited liability company, LAKE VIEW  
AG, a Liechtenstein company, BRN-LAKE  
VIEW JOINT VENTURE, an Idaho general  
partnership, ROBERT LEVIN, Trustee for the  
ROLAND M. CASATI FAMILY TRUST,  
dated June 5, 2008, RYKER YOUNG, Trustee

Case No. CV 09-2619

**AMERICAN BANK'S OPPOSITION TO  
ACI'S MOTION TO STRIKE  
AFFIDAVIT OF KYLE CAPPS**

STATE OF IDAHO }  
COUNTY OF KOOTENAI } SS  
FILED: 712 } KC

2011 NOV 22 PM 1:46

CLERK DISTRICT COURT  
*Sam Crump*  
DEPUTY

for the RYKER YOUNG REVOCABLE TRUST, MARSHALL CHESROWN a single man, IDAHO ROOFING SPECIALIST, LLC, an Idaho limited liability company, THORCO, INC., an Idaho corporation, CONSOLIDATED SUPPLY COMPANY, an Oregon corporation, INTERSTATE CONCRETE & ASPHALT COMPANY, an Idaho corporation, CONCRETE FINISHING, INC., an Arizona corporation, THE TURF CORPORATION, an Idaho corporation, WADSWORTH GOLF CONSTRUCTION COMPANY OF THE SOUTHWEST, a Delaware corporation, POLIN & YOUNG CONSTRUCTION, INC., an Idaho corporation, TAYLOR ENGINEERING, INC., a Washington corporation, PRECISION IRRIGATION, INC., an Arizona corporation and SPOKANE WILBERT VAULT CO., a Washington corporation, d/b/a WILBERT PRECAST,

Defendants.

Cross-Defendant American Bank ("American Bank") hereby submits the following memorandum in opposition to Cross-Claimant ACI Northwest, Inc.'s ("ACI") motion to strike the affidavit of Kyle Capps.

## I. INTRODUCTION

Kyle Capps is not affiliated with American Bank or ACI. Rather, he was the owner representative and project manager for BRN Development, Inc. ("BRN") for the Black Rock North construction project. American Bank filed the affidavit of Kyle Capps, in opposition to ACI's motion for summary judgment, to establish that certain work performed by ACI in 2009 was never authorized by BRN and that BRN objected to its liability for that work shortly after

ACI billed BRN's sister entity Black Rock Development, Inc. for that work.<sup>1</sup> Thus, the affidavit establishes facts that support American Bank's arguments that ACI filed its claim of lien too late and creates genuine issues of material facts as to the amount of ACI's claim of lien.

ACI now moves to strike Kyle Capps' affidavit claiming that the Capps affidavit contradicts his prior deposition testimony and contains inadmissible hearsay. This Court should deny ACI's motion because Mr. Capps' affidavit does not contradict his prior deposition testimony. Further, the alleged hearsay statements are not offered for the truth of the matters asserted, but rather to establish that on June 29, 2009, BRN objected to any liability for the work that ACI performed in 2009.

For the reasons articulated below, this Court should deny ACI's motion to strike the affidavit of Kyle Capps that was filed with this Court on November 4, 2011.

## II. ARGUMENT

### A. Kyle Capps Affidavit is Not Inconsistent with his Deposition Testimony.

On March 22, 2011, ACI's counsel, without providing any notice to American Bank, appeared at the 30(b)(6) deposition of BRN through BRN's designee, Kyle Capps, which 30(b)(6) deposition was noticed and taken by Taylor Engineering in the sub-trial dispute between Taylor Engineering and BRN. *See* Second Affidavit of C. Clayton Gill in Opposition to ACI's

---

<sup>1</sup> ACI's motion appears to premise all of its arguments on the notion that American Bank filed the affidavit of Kyle Capps in support of American Bank's Motion for Summary Judgment. However, American Bank's Motion for Summary Judgment filed on November 3, 2011, which addresses the validity of ACI's claim of lien, does not cite or otherwise rely on the affidavit of Kyle Capps. Rather, American Bank cites and relies on Kyle Capps' affidavit in its opposition to ACI's motion for summary judgment on the validity and amount of ACI's claim of lien. *See* American Bank's Statement of Facts in Opposition to ACI Northwest, Inc.'s Motion for Summary Judgment at ¶ 5; American Bank's Memorandum in Opposition to ACI's Motion for Summary Judgment at 3, n. 1.

Motion to Strike the Affidavit of Kyle Capps ("2nd Gill Aff.") at ¶ 4. At such deposition, Mr. Capps was shown and questioned about a summary exhibit number 51 that was prepared by ACI. When questioned about the accuracy of that exhibit number 51, Mr. Capps stated that he could not attest to the accuracy of that summary without first reviewing other documents. And instead of giving Mr. Capps an opportunity to review those records, ACI simply asked Mr. Capps if he was able to dispute the accuracy of portions of ACI's summary as he sat for his deposition that day without the benefit of reviewing the other documents that he requested.<sup>2</sup>

Q. Has there been ever any disagreement between Black Rock North and ACI in regards to money that is owed for the services and materials rendered for Black Rock North?

A. Probably, yes.

Q. Have they pretty much been ironed out, today, except for certain issues?

A. I would say, yes, except for the amounts that have been billed and not paid. Amounts that have been paid were agreed to with ACI prior to payment.

Q. Could I have you take a look at Exhibit 51.

A. (Complying.) Okay.

Q. Do you recognize that document?

A. I don't know if I've seen this exact document. But I recognize the items listed on it.

MR. LAYMAN: Is that ACI?

MR. WETZEL: Yes, ACI. 51 Exhibit to this deposition.

BY MR. WETZEL:

Q. Do you see how there are some columns as far as Invoice Date, Due Date, Job Number, et cetera?

A. Correct. Yes, I see that.

Q. Why don't you take some time and look through just above the line -- the first line on the bottom, those invoice dates and the number of invoice and job

---

<sup>2</sup> ACI also ignores American Bank's objection to the foundation of the question posed to Mr. Capps, i.e. whether he disagreed with ACI's summary. Given Mr. Capps' request to review additional documents before he answered ACI's question, American Bank's objection is well founded and should be sustained.

number.

A. (Complying.) Okay.

Q. Do you see where the exhibit seems to indicate that there is \$453,909.85 due and owing?

A. Correct.

Q. Do you see that?

A. I see that.

Q. Do you have any reason to believe that that's inaccurate?

A. No, I don't have any reason to believe.

Q. Could you testify today that it is more probably than not an accurate tabulation of the invoices that have been unpaid?

MR. GILL: Object to foundation.

THE WITNESS: I would probably want to review our accounting records before I could testify that I agree with those numbers. But I do agree that there were amounts of work at the end of that job unpaid and that this appears to be a representation of it.

BY MR. WETZEL:

Q. And you don't know of any reason, as you sit here today, to assume that there is anything which is incorrect in those numbers?

Right. I have no reason to assume that.

Q. And there's an interest column. And it shows \$123,288 owed.

A. Correct.

Q. Do you have any reason to believe that that interest is incorrect?

MR. GILL: Object to foundation.

THE WITNESS: I don't have any way of telling whether that's correct or not. I wasn't involved in the establishment of the interest rate or calculations of it.

BY MR. WETZEL:

Q. But you cannot, as you sit here today, say that it's incorrect?

A. That is true.

See Deposition of Kyle Capps taken on March 22, 2011, at 273:24-275:22, attached as Ex. C to the Affidavit of Steven C. Wetzel dated November 15, 2011.

Following the deposition of Mr. Capps, Mr. Capps was given: (1) the particular ACI invoice number 7093 in question for work that ACI allegedly performed in 2009; (2) other documents produced by ACI relating to that work; and (3) correspondence between ACI and BRN that related to the work allegedly performed in 2009. *See* Affidavit of C. Clayton Gill in Opposition to ACI's Motion to Strike the Affidavit of Kyle Capps ("1st Gill Aff.") at ¶ 2 and Ex. A attached thereto. Following Mr. Capps' review of these documents, Mr. Capps revised and executed the affidavit that has now been filed with the Court. *See* Ex. C to 1st Gill Aff.

In sum, Mr. Capps testified at his deposition that he could not attest to the accuracy of ACI's summary without first reviewing other documents. *See* Capps Depo. at 273:24-275:22. Because ACI did not give Mr. Capps a chance to review the other documents he requested, ACI cannot now complain that his affidavit contradicts his prior deposition testimony. *See Tolmie Farms v. J.R. Simplot Co.*, 124 Idaho 607, 610, 862 P.2d 299 (1993) ("... we perceive no 'contradiction' where the witness asserts in his affidavit facts which, at the time of his earlier deposition, he specifically had asserted he could not recall.").

Rather, to constitute a sham affidavit, ACI must prove that Mr. Capps' affidavit directly contradicts his prior deposition testimony, which ACI cannot establish. *Id.* (citing *Kennedy v. Allied Mut.*, 952 F.2d 262, 266-67 (9th Cir. 1991) ("district court must determine that affidavit contradicting prior testimony is a 'sham' before it determines that affidavit cannot be used to create an issue of fact precluding summary judgment"); *Matter of Estate v. Keeven*, 126 Idaho 290, 298, 882 P.2d 457 (Ct. App. 1994) ("Mr. Keeven's deposition responses to questions regarding when he and the decedent began living together are vague and evasive, but because

they are vague and express uncertainty, they are not directly contradicted by statements in his later affidavit."<sup>1</sup>

Simply put, Mr. Capps' affidavit does not contradict his prior deposition testimony and ACI's motion to strike on that basis should therefore be denied.

**B. Kyle Capps' Affidavit Does Not Include Inadmissible Hearsay.**

ACI objects to the inclusion of Exhibit C to Kyle Capps' affidavit, i.e. a letter from BRN attorney Kathryn R. McKinley to ACI President Jim Hancke dated June 29, 2009. American Bank is not offering that letter for the truth of the statements asserted in the letter. Rather, American Bank is simply establishing that BRN objected to its liability for payment of ACI Invoice number 7093 in June of 2009, long before Mr. Capps' affidavit was filed with this Court. Thus, because the letter is not offered for the truth of the matters asserted in the letter, it is not inadmissible hearsay. See I.R.E. 801(c).

**C. ACI's Other Evidence Offered to Contradict the Kyle Capps' Affidavit at Best Creates a Question of Fact, but Otherwise is Irrelevant to ACI's Motion to Strike Kyle Capps' Affidavit.**

ACI offers a plethora of evidence to support its assertion that BRN approved the work that ACI completed in 2009 and that is the subject of ACI invoice 7093. First, that evidence is not relevant to the motion to strike Kyle Capps' affidavit, but rather, at best, creates a question of fact as to whether BRN approved and is liable for the work that is the subject of ACI

---

<sup>1</sup> ACI attempts to argue that the word "this" used by Mr. Capps in his deposition testimony at page 275, line 17 refers to invoice number 7093. See ACI Northwest, Inc.'s Memorandum in Support of Motion to Strike Affidavit of Kyle Capps at pp. 5-6. However, nowhere in Mr. Capps' deposition does he refer to ACI invoice 7093. Thus, drawing the requested inference of the word "this" in favor of ACI would violate the rules of summary judgment that require the Court to draw all reasonable inferences in favor of American Bank as the non-moving party, especially considering that the affidavit of Kyle Capps has only been offered by American Bank in opposition to ACI's motion for summary judgment.

invoice 7093. Second, most of the evidence offered by ACI does not support ACI's factual assertions and otherwise constitutes inadmissible hearsay.

For example, ACI offers an e-mail from BRN Chief Financial Officer Chad Roundtree for the proposition that "Chad Roundtree . . . confirms the BRN obligation to pay invoice #7093." *See* ACI's Memorandum in Support of Motion to Strike Affidavit of Kyle Capps at p. 6, citing Exhibit B to the Affidavit of Ada Loper in Support of ACI Northwest, Inc.'s Motion for Partial Summary Judgment. Mr. Roundtree's e-mail actually states: "Ada and I just reviewed today: The correct total is 455,838.05 (includes all t&m billings, retention, etc.); adjusted for a panhandle C.O. billing." *See* Ex. B to the Affidavit of Ada Loper in Support of ACI Northwest, Inc.'s Motion for Partial Summary Judgment. Nowhere does Chad Roundtree mention invoice 7093 or BRN's liability for the same. Finally, if ACI is offering Mr. Roundtree's e-mail to prove the truth of the assertion he makes in such e-mail, it is hearsay and should not be considered by this Court. *See* I.R.E. 801(c) and 802.

The same applies to the statements made by William Radobenko in his affidavit filed on November 15, 2011, in support of ACI's motion to stay litigation and compel mediation and arbitration. Therein, Mr. Radobenko testifies about statements made by Marshall Chesrown and offers e-mails from BRN which are also offered for the truth asserted therein and thus constitutes inadmissible hearsay. *See* I.R.E. 801(c) and 802. Further, there is nothing in the emails attached to Mr. Radobenko's affidavits that establishes without equivocation BRN's liability for ACI invoice 7093 or that such work was approved by BRN.



**D. ACI's Motion to Continue American Bank's Motion for Summary Judgment Should be Denied.**


American Bank does not cite or rely on the affidavit of Kyle Capps in its motion for summary judgment that American Bank filed on November 3, 2011 (re: ACI's Count Three of its Cross-Claim to Foreclose its Claim of Lien). Thus, there is no reason to continue American Bank's motion for summary judgment. Further, any requests to continue summary judgment for purposes of obtaining additional affidavits or deposition excerpts are governed by Rule 56(f) of the Idaho Rules of Civil Procedure and ACI has made no showing that its request for a continuance comports with the requirements of Rule 56(f).

**III. CONCLUSION**

For the foregoing reasons, ACI's motion to strike the affidavit of Kyle Capps should be denied. His affidavit does not contradict his prior deposition testimony and does not contain inadmissible hearsay.

DATED this 22<sup>nd</sup> day of November, 2011.

MOFFATT, THOMAS, BARRETT, ROCK &  
FIELDS, CHARTERED

By   
C. Clayton Gill – Of the Firm  
Attorneys for Plaintiff

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 22<sup>nd</sup> day of November, 2011, I caused a true and correct copy of the foregoing **AMERICAN BANK'S OPPOSITION TO ACT'S MOTION TO STRIKE AFFIDAVIT OF KYLE CAPPS** to be served by the method indicated below, and addressed to the following:

John R. Layman  
LAYMAN, LAYMAN & ROBINSON, PLLP  
601 S. Division St.  
Spokane, WA 99202  
Facsimile (509) 624-2902  
*Attorney for Defendants BRN Development,  
BRN Investments, BRN-Lake View Joint  
Venture, Marshall Chesrown, Lake View AG,  
Robert Levin, Trustee For The Roland M.  
Casati Family Trust, Dated June 5, 2008*

( ) U.S. Mail, Postage Prepaid  
( ) Hand Delivered  
( ) Overnight Mail  
( ) Facsimile  
(☒) E-mail

Charles B. Lempesis  
ATTORNEY AT LAW  
W. 201 Seventh Ave.  
Post Falls, ID 83854  
Facsimile (208) 773-1044  
*Attorney for Defendant Thorco, Inc.*

( ) U.S. Mail, Postage Prepaid  
( ) Hand Delivered  
( ) Overnight Mail  
( ) Facsimile  
(☒) E-mail

Edward J. Anson  
WITHERSPOON, KELLEY, DAVENPORT  
& TOOLE, P.S.  
608 Northwest Blvd. #300  
Coeur d'Alene, ID 83814-2146  
Facsimile (208) 667-8470  
*Attorney for Defendants The Turf Corporation,  
Wadsworth Golf Construction Company of the  
Southwest and Precision Irrigation, Inc.*

( ) U.S. Mail, Postage Prepaid  
( ) Hand Delivered  
( ) Overnight Mail  
( ) Facsimile  
(☒) E-mail

Richard D. Campbell  
CAMPBELL & BISSELL, PLLC  
7 S. Howard St. #416  
Spokane, WA 99201  
Facsimile (509) 455-7111  
*Attorneys for Defendant Polin & Young  
Construction*

( ) U.S. Mail, Postage Prepaid  
( ) Hand Delivered  
( ) Overnight Mail  
( ) Facsimile  
(☒) E-mail

M. Gregory Embrey  
WITHERSPOON, KELLEY, DAVENPORT &  
TOOLE, P.S.  
608 NW Blvd., Suite 300  
Coeur d'Alene, ID 83814-2174  
Facsimile (208) 667-8470  
*Attorney for Defendant Taylor Engineering, Inc.*

☐ U.S. Mail, Postage Prepaid  
☐ Hand Delivered  
☐ Overnight Mail  
☐ Facsimile  
☒ E-mail

Steven C. Wetzel  
Kenneth L. Huitt  
JAMES, VERNON & WEEKS, PA  
1626 Lincoln Way  
Coeur d'Alene, ID 83814  
Facsimile (208) 664-1684  
*Attorneys for Defendant ACI Northwest, Inc.*

☐ U.S. Mail, Postage Prepaid  
☐ Hand Delivered  
☐ Overnight Mail  
☒ Facsimile  
☐ E-mail

Terrance R. Harris  
RAMSDEN & LYONS, LLP  
700 Northwest Blvd.  
P.O. Box 1336  
Coeur d'Alene, ID 83816-1336  
Facsimile (208) 664-5884  
*Attorneys for Receiver*

☐ U.S. Mail, Postage Prepaid  
☐ Hand Delivered  
☐ Overnight Mail  
☐ Facsimile  
☒ E-mail

Douglas S. Marfice  
RAMSDEN & LYONS, LLP  
700 Northwest Blvd.  
P.O. Box 1336  
Coeur d'Alene, ID 83816-1336  
Facsimile (208) 664-5884  
*Attorneys for Defendant Ryker Young Revocable Trust*

☐ U.S. Mail, Postage Prepaid  
☐ Hand Delivered  
☐ Overnight Mail  
☐ Facsimile  
☒ E-mail

  
\_\_\_\_\_  
C. Clayton Gill

STATE OF IDAHO  
COUNTY OF KOOTENAI  
FILED: 712 *ISS*

2011 NOV 22 PM 1:47

CLERK DISTRICT COURT

DEPUTY

Randall A. Peterman, ISB No. 1944  
C. Clayton Gill, ISB No. 4973  
Tyler J. Anderson, ISB No. 6632  
MOFFATT, THOMAS, BARRETT, ROCK &  
FIELDS, CHARTERED  
101 S. Capitol Blvd., 10th Floor  
Post Office Box 829  
Boise, Idaho 83701  
Telephone (208) 345-2000  
Facsimile (208) 385-5384  
rap@moffatt.com  
ccg@moffatt.com  
tja@moffatt.com  
23690.0022

Nancy L. Isserlis, ISB No. 7331  
Elizabeth A. Tellessen, ISB No. 7393  
WINSTON & CASHATT  
250 Northwest Blvd., Suite 107A  
Coeur d'Alene, Idaho 83814  
Telephone (509) 838-6131  
Facsimile (509) 838-1416

Attorneys for Plaintiff

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

AMERICAN BANK, a Montana banking  
corporation,

Plaintiff,

vs.

BRN DEVELOPMENT, INC., an Idaho  
corporation, BRN INVESTMENTS, LLC, an  
Idaho limited liability company, LAKE VIEW  
AG, a Liechtenstein company, BRN-LAKE  
VIEW JOINT VENTURE, an Idaho general  
partnership, ROBERT LEVIN, Trustee for the  
ROLAND M. CASATI FAMILY TRUST,  
dated June 5, 2008, RYKER YOUNG, Trustee

Case No. CV 09-2619

**SECOND AFFIDAVIT OF  
C. CLAYTON GILL IN OPPOSITION  
TO ACI'S MOTION TO STRIKE THE  
KYLE CAPPS AFFIDAVIT**

for the RYKER YOUNG REVOCABLE TRUST, MARSHALL CHESROWN a single man, IDAHO ROOFING SPECIALIST, LLC, an Idaho limited liability company, THORCO, INC., an Idaho corporation, CONSOLIDATED SUPPLY COMPANY, an Oregon corporation, INTERSTATE CONCRETE & ASPHALT COMPANY, an Idaho corporation, CONCRETE FINISHING, INC., an Arizona corporation, THE TURF CORPORATION, an Idaho corporation, WADSWORTH GOLF CONSTRUCTION COMPANY OF THE SOUTHWEST, a Delaware corporation, POLIN & YOUNG CONSTRUCTION, INC., an Idaho corporation, TAYLOR ENGINEERING, INC., a Washington corporation, PRECISION IRRIGATION, INC., an Arizona corporation and SPOKANE WILBERT VAULT CO., a Washington corporation, d/b/a WILBERT PRECAST,

Defendants.

STATE OF IDAHO )  
 ) ss.  
County of ADA )

C. CLAYTON GILL, having been duly sworn upon oath, deposes and states as follows:

1. I am counsel of record for American Bank and make this affidavit upon my own personal knowledge.
2. On March 22, 2011, I was in Coeur d'Alene, Idaho to appear for oral arguments scheduled that day regarding American Bank's disputed motions with Wadsworth and ACI that were scheduled for hearing that day.

3. As the Court is well aware, this action relates to various sub-disputes amongst the parties, e.g. Wadsworth's action to foreclose its claim of lien; ACI's action to foreclose its claim of lien; and the malpractice action between BRN and Taylor Engineering.

4. On March 22, 2011, Taylor Engineering noticed up a 30(b)(6) deposition of BRN Development, Inc. Taylor Engineering's notice containing the topics to be the subject of such 30(b)(6) deposition is attached hereto as Exhibit A. None of the topics in Taylor Engineering's deposition notice identified ACI's claim of lien or amounts that BRN owed to ACI as a subject of such 30(b)(6) deposition.

5. BRN designated Kyle Capps as its designee for BRN's 30(b)(6) deposition that was noticed for hearing on March 22, 2011, by Taylor Engineering.

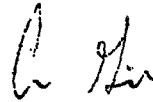
6. Just prior to lunch on March 22, 2011, Taylor Engineering's attorney M. Gregory Embrey notified me that ACI's attorney, Steven Wetzel, intended to appear at Kyle Capps' deposition and ask Kyle Capps questions. This was the first notice I received about ACI's intent to depose Kyle Capps on any matter related to ACI's action to foreclose its claim of lien. ACI never served written notice of its intent to question Kyle Capps, nor did ACI's counsel ever call any attorney for American Bank to notify American Bank of ACI's intent to examine Kyle Capps.

7. At the Kyle Capps deposition, ACI's attorney, Steven Wetzel, questioned Mr. Capps about exhibits that had never been produced in this action until they were presented to Mr. Capps for questioning at the March 22, 2011, deposition. See e.g. exhibit 53 to the Kyle Capps Deposition, attached within Ex. C to the Affidavit of Steven C. Wetzel dated November 15, 2011.

8. Because ACI failed to give notice and failed to produce the documents it questioned Mr. Capps about prior to his deposition taken on March 22, 2011, my ability to cross-examine Mr. Capps was severely hindered as I had no time whatsoever to prepare for that deposition. And just out of pure luck with my being in town for the hearings noticed that same day was I even able to attend that deposition.

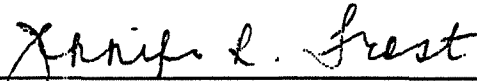
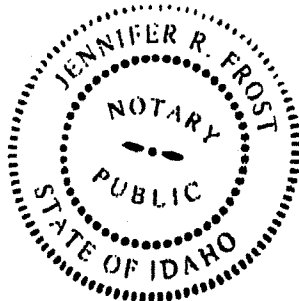
9. American Bank asks this Court to consider these facts when considering ACI's motion to strike the affidavit of Kyle Capps and ACI's erroneous argument that Mr. Capps' affidavit contradicts his prior deposition testimony.

Further your affiant sayeth naught.



C. Clayton Gill

SUBSCRIBED AND SWORN to before me this 20<sup>th</sup> day of November, 2011.



NOTARY PUBLIC FOR IDAHO

Residing at Boise, ID

My Commission Expires 7/24/2012

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 22<sup>nd</sup> day of November, 2011, I caused a true and correct copy of the foregoing **SECOND AFFIDAVIT OF C. CLAYTON GILL IN OPPOSITION TO ACI'S MOTION TO STRIKE THE KYLE CAPPS AFFIDAVIT** to be served by the method indicated below, and addressed to the following:

John R. Layman  
LAYMAN, LAYMAN & ROBINSON, PLLP  
601 S. Division St.  
Spokane, WA 99202  
Facsimile (509) 624-2902  
*Attorney for Defendants BRN Development,  
BRN Investments, BRN-Lake View Joint  
Venture, Marshall Chesrown, Lake View AG,  
Robert Levin, Trustee For The Roland M.  
Casati Family Trust, Dated June 5, 2008*

☐ U.S. Mail, Postage Prepaid  
☐ Hand Delivered  
☐ Overnight Mail  
☐ Facsimile  
☒ E-mail

Charles B. Lempesis  
ATTORNEY AT LAW  
W. 201 Seventh Ave.  
Post Falls, ID 83854  
Facsimile (208) 773-1044  
*Attorney for Defendant Thorco, Inc.*

☐ U.S. Mail, Postage Prepaid  
☐ Hand Delivered  
☐ Overnight Mail  
☐ Facsimile  
☒ E-mail

Edward J. Anson  
WITHERSPOON, KELLEY, DAVENPORT  
& TOOLE, P.S.  
608 Northwest Blvd. #300  
Coeur d'Alene, ID 83814-2146  
Facsimile (208) 667-8470  
*Attorney for Defendants The Turf Corporation,  
Wadsworth Golf Construction Company of the  
Southwest and Precision Irrigation, Inc.*

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Richard D. Campbell  
CAMPBELL & BISSELL, PLLC  
7 S. Howard St. #416  
Spokane, WA 99201  
Facsimile (509) 455-7111  
*Attorneys for Defendant Polin & Young  
Construction*

☐ U.S. Mail, Postage Prepaid  
☐ Hand Delivered  
☐ Overnight Mail  
☐ Facsimile  
☒ E-mail



M. Gregory Embrey  
WITHERSPOON, KELLEY, DAVENPORT &  
TOOLE, P.S.  
608 NW Blvd., Suite 300  
Coeur d'Alene, ID 83814-2174  
Facsimile (208) 667-8470  
*Attorney for Defendant Taylor Engineering, Inc.*

☐ U.S. Mail, Postage Prepaid  
☐ Hand Delivered  
☐ Overnight Mail  
☐ Facsimile  
☒ E-mail

Steven C. Wetzel  
Kenneth L. Huitt  
JAMES, VERNON & WEEKS, PA  
1626 Lincoln Way  
Coeur d'Alene, ID 83814  
Facsimile (208) 664-1684  
*Attorneys for Defendant ACI Northwest, Inc.*


☐ U.S. Mail, Postage Prepaid  
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Terrance R. Harris  
RAMSDEN & LYONS, LLP  
700 Northwest Blvd.  
P.O. Box 1336  
Coeur d'Alene, ID 83816-1336  
Facsimile (208) 664-5884  
*Attorneys for Receiver*

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☒ E-mail

Douglas S. Marfice  
RAMSDEN & LYONS, LLP  
700 Northwest Blvd.  
P.O. Box 1336  
Coeur d'Alene, ID 83816-1336  
Facsimile (208) 664-5884  
*Attorneys for Defendant Ryker Young Revocable Trust*

☐ U.S. Mail, Postage Prepaid  
☐ Hand Delivered  
☐ Overnight Mail  
☐ Facsimile  
☒ E-mail



C. Clayton Gill

# EXHIBIT A

1953

Fax sent by : 2086678478

WITHERSPOON KELLY

83-15-11 15:54

Pg: 12/23

1  
2  
3 M. Gregory Embrey, ISB No. 6045  
4 Witherspoon, Kelley, Davenport & Toole, P.S.  
5 The Spokesman Review Building  
6 608 Northwest Blvd., Suite 300  
7 Coeur d'Alene, Idaho 83814  
8 Telephone: (208) 667-4000  
9 Facsimile: (208) 667-8470  
10 Email: [mge@witherspoonkelley.com](mailto:mge@witherspoonkelley.com)

11 *Attorneys for Taylor Engineering, Inc.*

12  
13 IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT  
14 OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

15 AMERICAN BANK, a Montana banking corporation,

16 Plaintiff,

17 vs.

18 BRN DEVELOPMENT, INC., an Idaho corporation,  
19 BRN INVESTMENTS, LLC, an Idaho limited liability  
20 company, LAKE VIEW AG, a Liechtenstein company,  
21 BRN-LAKE VIEW JOINT VENTURE, an Idaho  
22 general partnership, ROBERT LEVIN, Trustee for the  
23 ROLAND M. CASATI FAMILY TRUST, dated June  
24 5, 2008, RYKER YOUNG, Trustee for the RYKER  
25 YOUNG REVOCABLE TRUST, MARSHALL  
26 CHESROWN a single man, IDAHO ROOFING  
27 SPECIALIST, LLC, an Idaho limited liability  
28 company, THORCO, INC., an Idaho corporation,  
CONSOLIDATED SUPPLY COMPANY, an Oregon  
corporation, INTERSTATE CONCRETE & ASPHALT  
COMPANY, an Idaho corporation, CONCRETE  
FINISHING, INC., an Arizona corporation,  
WADSWORTH GOLF CONSTRUCTION  
COMPANY OF THE SOUTHWEST, a Delaware  
corporation, THE TURF CORPORATION, an Idaho  
corporation, POLIN & YOUNG CONSTRUCTION,  
INC., an Idaho corporation, TAYLOR  
ENGINEERING, INC., a Washington corporation,

NO. CV-09-2619

FIFTH AMENDED NOTICE  
OF INTENT TO TAKE I.R.C.P.  
30(b)(6) DEPOSITION OF  
CORPORATE DESIGNEES OF  
BRN DEVELOPMENT, INC.

Fax sent by : 2006678470

WITHERSPOON KELLY

03-15-11 15:55

**Pg: 13/23**

**PRECISION IRRIGATION, INC., an Arizona corporation and SPOKANE WILBERT VAULT CO., a Washington corporation, d/b/a WILBERT PRECAST,**

**Defendants,**

And

**TAYLOR ENGINEERING, INC.,** a Washington corporation,

**Third-Party Plaintiff,**

 $\gamma$ 

**ACI NORTHWEST, INC., an Idaho corporation;  
STRATA, INC., an Idaho corporation; and  
SUNDANCE INVESTMENTS, LLP, a limited liability  
partnership.**

### Third-Party Defendants,

And

**ACI NORTHWEST, INC.**, an Idaho corporation,

## Cross-Claimant.

**y.**

AMERICAN BANK, a Montana banking corporation, BRN DEVELOPMENT, INC., an Idaho corporation, BRN INVESTMENTS, LLC, an Idaho limited liability company, LAKE VIEW AG, a Liechtenstein company, BRN-LAKE VIEW JOINT VENTURE, an Idaho general partnership, ROBERT LEVIN, Trustee for the ROLAND M. CASATI FAMILY TRUST, dated June 5, 2008, RYKER YOUNG, Trustee for the RYKER YOUNG REVOCABLE TRUST, MARSHALL CHESROWN a single man, THORCO, INC., an Idaho corporation, CONSOLIDATED SUPPLY COMPANY, an Oregon corporation, THE TURF CORPORATION, an Idaho corporation, WADSWORTH GOLF CONSTRUCTION COMPANY OF THE SOUTHWEST, a Delaware corporation, POLIN & YOUNG CONSTRUCTION, INC., an Idaho corporation, TAYLOR ENGINEERING, INC., a Washington corporation, and PRECISION IRRIGATION, INC., an Arizona corporation,

**Cross Claim Defendants.**

Fax sent by : 2086678478

WITHERSPOON KELLY

83-15-11 15:55

Pg: 14/23

1 TO: The Clerk of the Court and

2 TO: All parties and their counsel

3  
4 NOTICE IS HEREBY GIVEN that Defendant Taylor Engineering Inc., above-named, by  
5 and through its attorneys of record, M. Gregory Embroy of Witherspoon Kelley, will take the  
6 deposition of the Corporate Designees for BRN Development, Inc., pursuant to I.R.C.P.  
7 30(b)(6), whom possess information and knowledge as it relates to the following subject  
8 matters:

9  
10 1. BRN Development, Inc.'s (hereinafter "Company") communications of every  
11 kind with representatives of Taylor Engineering, Inc.

12 2. All facts supporting each and every claim contained in Company's cross-claim  
13 against Taylor Engineering, Inc.

14 3. All facts supporting Company's claim of professional negligence against Taylor  
15 Engineering, Inc.

16 4. All facts supporting Company's claim of negligent misrepresentation against  
17 Taylor Engineering, Inc.

18 5. All facts supporting Company's claim of intentional misrepresentation against  
19 Taylor Engineering, Inc.

20 6. The Company's answers and responses to Taylor Engineering, Inc.'s First Set of  
21 Interrogatories and Requests for Production to BRN Development, Inc., Second Set of  
22 Interrogatories and Requests for Production of Documents to BRN Development, Inc., and  
23 Third Set of Interrogatories and Requests for Production of Documents to BRN Development,  
24 Inc.

25 7. All facts supporting the damages sought by Company pursuant to Company's  
26 cross-claim against Taylor Engineering, Inc.

Fax sent by : 2806678470

WITHERSPOON KELLY

03-15-11 15:56

Pg: 15/23

The deposition(s) will be taken on oral examination before an official court reporter and notary public in and for the State of Idaho, or some other official authorized by law to administer oaths, at the date, time, and place herein set forth.

**DATE:** March 22, 2011

**TIME:** 1:00 p.m.

**PLACE:** Witherspoon Kelley  
608 Northwest Boulevard, Suite 300  
Coeur d'Alene, Idaho 83814  
(208) 667-4000

The taking of said deposition is in accordance with the Civil Rules of Procedure 26, et seq., and shall be subject to continuance until completed.

DATED this 15<sup>th</sup> day of March, 2011.

WITHERSPOON, KELLEY, DAVENPORT  
& TOOLE, P.S.

**M. Gregory Emsrey**  
*Attorneys for Taylor Engineering Inc.*

Fax sent by : 2086678478

WITHERNSPOON KELLY

03-15-11 15:56

Pg: 16/23

**CERTIFICATE OF SERVICE**

I certify that on this 15<sup>th</sup> day of March, 2011, I caused a true and correct copy of the FIFTH AMENDED NOTICE OF INTENT TO TAKE 30(b)(6) DEPOSITION OF CORPORATE DESIGNEES OF BRN DEVELOPMENT, INC. to be forwarded, with all required charges prepaid, by the method(s) indicated below, to the following person(s):

Nancy L. Issorlis  
Elizabeth A. Telleson  
Winston & Cashatt  
Bank of America Financial Center  
601 W. Riverside, Suite 1900  
Spokane, Washington 99201-0695  
*Attorney for Plaintiff*

☐  
☐  
☐  
☒

U.S. Mail  
Hand Delivered  
Overnight Mail  
Via Fax: 509-838-1416

Randall A. Peterman  
C. Clayton Gill  
Moffatt Thomas Barrett Rock & Fields Chd.  
101 S. Capital Blvd., 10<sup>th</sup> Floor  
Boise, Idaho 83702  
*Attorney for Plaintiff American Bank*

☐  
☐  
☐  
☒

U.S. Mail  
Hand Delivered  
Overnight Mail  
Via Fax: 208-385-5384

Richard D. Campbell  
Campbell, Bissell & Kirby, PLLC  
7 South Howard Street, Suite 416  
Spokane, WA 99201  
*Attorney for Defendant, Polin & Young Construction, Inc.*

☐  
☐  
☐  
☒

U.S. Mail  
Hand Delivered  
Overnight Mail  
Via Fax: 509-455-7111

Charles B. Lompelis  
Attorney at Law  
W 201 7<sup>th</sup> Avenue  
Post Falls, Idaho 83854  
*Counsel for Thorco, Inc.*

☐  
☐  
☐  
☒

U.S. Mail  
Hand Delivered  
Overnight Mail  
Via Fax: 208-773-1044

Cory J. Rippee  
Eberle, Berlin, Kading, Turnbow & McKivcen  
P.O. Box 1368  
Boise, ID 83701-1368  
*Attorney for Sundance Investments, LLP*

☐  
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☐  
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U.S. Mail  
Hand Delivered  
Overnight Mail  
Via Fax: 208-334-8542

Fax sent by : 2086678470

WITHERSPOON KELLY

03-15-11 15:56

Pg: 17/23

1	John R. Layman	<input type="checkbox"/>	U.S. Mail
2	Layman, Layman & Robinson, PLLP	<input type="checkbox"/>	Hand Delivered
3	601 S. Division Street	<input type="checkbox"/>	Overnight Mail
4	Spokane, Washington 99202	<input checked="" type="checkbox"/>	Via Fax: 509-624-2902
5	<i>Counsel for BRN Development, Inc.,</i>		
6	<i>BRN Investments, Lake View AG, Robert Leven, Trustee</i>		
7	<i>for the Roland M. Cusati Family Trust, Marshall</i>		
8	<i>Chestrown and Ryker Young</i>		
9	Barry W. Davidson	<input type="checkbox"/>	U.S. Mail
10	Davidson Backman Medeiros, PLLC	<input type="checkbox"/>	Hand Delivered
11	1550 Bank of America Center	<input type="checkbox"/>	Overnight Mail
12	601 W. Riverside Avenue	<input checked="" type="checkbox"/>	Via Fax: 509-623-1660
13	Spokane, WA 99201		
14	<i>Co-Counsel with John R. Layman</i>		
15	Edward J. Anson	<input type="checkbox"/>	U.S. Mail
16	Witherspoon Kelley	<input checked="" type="checkbox"/>	Hand Delivered
17	608 Northwest Blvd., Ste. 300	<input type="checkbox"/>	Overnight Mail
18	Coeur d'Alene, Idaho 83814	<input checked="" type="checkbox"/>	Via Fax: 509-458-2728
19	<i>Attorneys for Defendant Wadsworth Golf</i>		
20	<i>Construction Company of the Southwest,</i>		
21	<i>The Turf Corporation and Precision</i>		
22	<i>Irrigation, Inc.</i>		
23	Terrance R. Harris	<input type="checkbox"/>	U.S. Mail
24	Ramsden & Lyons, LLP	<input type="checkbox"/>	Hand Delivered
25	P.O. Box 1336	<input type="checkbox"/>	Overnight Mail
26	Coeur d'Alene, Idaho 83816-1336	<input checked="" type="checkbox"/>	Via Fax: 208-664-5884
27	<i>Receiver Maggie Y. Lyons</i>		
28	Steven C. Wetzel & Kevin P. Holt	<input type="checkbox"/>	U.S. Mail
29	Wetzel Wetzel & Holt, P.L.L.C.	<input type="checkbox"/>	Hand Delivered
30	616 North 4 <sup>th</sup> Street, Suite 3	<input type="checkbox"/>	Overnight Mail
31	Coeur d'Alene, Idaho 83814	<input checked="" type="checkbox"/>	Via Fax: 208-664-6741
32	<i>Attorney for Third Party Defendant ACI</i>		
33	Douglas Marfice	<input type="checkbox"/>	U.S. Mail
34	Ramsden & Lyons, LLP	<input type="checkbox"/>	Hand Delivered
35	P.O. Box 1336	<input type="checkbox"/>	Overnight Mail
36	Coeur d'Alene, Idaho 83816-1336	<input checked="" type="checkbox"/>	Via Fax: 208-664-5884
37	<i>Attorneys for Trustee of the Ryker Young Revocable Trust</i>		

*Tina Marie Bell*  
Tina Marie Bell



2011 NOV 22 PM 2: 22

CLERK DISTRICT COURT  
*Sanli Gungor*  
DEPUTY

NANCY L. ISSERLIS, ISB #7331  
ELIZABETH A. TELLESSEN, ISB #7393  
WINSTON & CASHATT  
250 Northwest Boulevard, Suite 206  
Coeur d'Alene, Idaho 83814  
Telephone: (208) 667-2103  
Facsimile: (208) 765-2121  
nli@winstoncashatt.com & eat@winstoncashatt.com

RANDALL A. PETERMAN, ISB #1944  
C. CLAYTON GILL, ISB # 4973  
MOFFATT, THOMAS, BARRETT, ROCK  
& FIELDS, CHARTERED  
101 South Capital Blvd., 10<sup>th</sup> Floor  
P.O. Box 829  
Boise, Idaho 83701  
Telephone: (208) 345-2000  
Facsimile: (208) 385-5384  
rap@moffatt.com & ccg@moffatt.com

Attorneys for Plaintiff

**IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE  
OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI**

AMERICAN BANK, a Montana banking  
corporation,

Plaintiff,

vs.

BRN DEVELOPMENT, INC., an Idaho  
corporation, BRN INVESTMENTS, LLC, an  
Idaho limited liability company, LAKE VIEW  
AG, a Liechtenstein company, BRN-LAKE  
VIEW JOINT VENTURE, an Idaho general  
partnership, ROBERT LEVIN, Trustee for the  
ROLAND M. CASATI FAMILY TRUST, dated  
June 5, 2008, E. RYKER YOUNG, Trustee for  
the E. RYKER YOUNG REVOCABLE TRUST,  
MARSHALL CHESROWN a single man,  
IDAHO ROOFING SPECIALIST, LLC, an Idaho  
limited liability company, THORCO, INC., an

Case No. CV 09-2619

**AMERICAN BANK'S OBJECTION TO THE  
AFFIDAVIT OF STEVEN WETZEL DATED  
NOVEMBER 15, 2011**

**ORIGINAL**

AMERICAN BANK'S OBJECTION TO THE AFFIDAVIT OF STEVEN  
WETZEL DATED NOVEMBER 15, 2011 - 1

*Winston & Cashatt*  
A PROFESSIONAL SERVICE CORPORATION  
250 Northwest Blvd., Suite 206  
Coeur d'Alene, Idaho 83814  
Phone: (208) 667-2103

1960

1 Idaho corporation, CONSOLIDATED SUPPLY  
2 COMPANY, an Oregon corporation,  
3 INTERSTATE CONCRETE & ASPHALT  
4 COMPANY, an Idaho corporation, CONCRETE  
5 FINISHING, INC., an Arizona corporation, THE  
6 TURF CORPORATION, an Idaho corporation,  
7 WADSWORTH GOLF CONSTRUCTION  
8 COMPANY OF THE SOUTHWEST, a Delaware  
9 corporation, POLIN & YOUNG  
10 CONSTRUCTION, INC., an Idaho corporation,  
11 TAYLOR ENGINEERING, INC., a Washington  
12 corporation, PRECISION IRRIGATION, INC.,  
13 an Arizona corporation and SPOKANE  
14 WILBERT VAULT CO., a Washington  
15 corporation, d/b/a WILBERT PRECAST,

Defendants.

And

12 TAYLOR ENGINEERING, INC., a Washington  
13 corporation,

Third-Party Plaintiff,

v.

16 ACI NORTHWEST, INC., an Idaho corporation;  
17 STRATA, INC., an Idaho corporation; and  
18 SUNDANCE INVESTMENTS, LLP, a limited  
19 liability partnership,

Third-Party Defendants.

And

21 ACI NORTHWEST, INC., an Idaho corporation,

Cross-Claimant,

v.

24 AMERICAN BANK, a Montana banking  
25 corporation, BRN DEVELOPMENT, INC., an  
26 Idaho corporation, BRN INVESTMENTS, LLC,

AMERICAN BANK'S OBJECTION TO THE AFFIDAVIT OF STEVEN  
WETZEL DATED NOVEMBER 15, 2011 - 2

*Winston & Cashatt*  
A PROFESSIONAL SERVICE CORPORATION  
250 Northwest Blvd., Suite 206  
Coeur d'Alene, Idaho 83814  
Phone: (208) 667-2103

1961

1 an Idaho limited liability company, LAKE VIEW  
2 AG, a Liechtenstein company, BRN-LAKE  
3 VIEW JOINT VENTURE, an Idaho general  
4 partnership, ROBERT LEVIN, Trustee for the  
5 ROLAND M. CASATI FAMILY TRUST, dated  
6 June 5, 2008, E. RYKER YOUNG, Trustee for  
7 the E. RYKER YOUNG REVOCABLE TRUST,  
8 MARSHALL CHESROWN a single man,  
9 THORCO, INC., an Idaho corporation,  
10 CONSOLIDATED SUPPLY COMPANY, an  
11 Oregon corporation, THE TURF  
12 CORPORATION, an Idaho corporation,  
13 WADSWORTH GOLF CONSTRUCTION  
14 COMPANY OF THE SOUTHWEST, a Delaware  
15 corporation, POLIN & YOUNG  
16 CONSTRUCTION, INC., an Idaho corporation,  
17 TAYLOR ENGINEERING, INC., a Washington  
18 corporation and PRECISION IRRIGATION,  
19 INC., an Arizona corporation,

20  
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26  
Cross Claim Defendants.

Plaintiff American Bank, by and through its attorneys of record, Nancy L. Isserlis and Elizabeth A. Tellessen of Winston & Cashatt, hereby objects to Exhibit G to the Affidavit of Steven C. Wetzel Dated 11-15-11, which is a press-release from Fidelity National Financial, and undeniably hearsay under IRE 802.

Idaho has no published court decisions confirming that a press release issued by a third party is inadmissible hearsay. However, the Hawaii Supreme Court stated that a third party press release attached to a motion for summary judgment is in admissible hearsay. Sierra Club v. Hawaii Tourism Authority, 59 P.3d 877, 890 (Hawaii 2002). Furthermore, press releases are commonly biased and do not always reflect the true facts or circumstances. The Statements in a press release are precisely the


AMERICAN BANK'S OBJECTION TO THE AFFIDAVIT OF STEVEN  
WETZEL DATED NOVEMBER 15, 2011 - 3

*Winston & Cashatt*  
A PROFESSIONAL SERVICE CORPORATION  
250 Northwest Blvd., Suite 208  
Coeur d'Alene, Idaho 83814  
Phone: (208) 667-2103

1962

1 type of evidence the hearsay rule is designed to avoid. Therefore, American Bank requests the court  
2 exclude Exhibit G as inadmissible hearsay. IRE 802.

3 DATED this 22 day of November, 2011.

4   
5 ELIZABETH A. TELLESSEN, ISB No. 7393  
6 WINSTON & CASHATT  
7 Attorneys for Plaintiff American Bank  
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AMERICAN BANK'S OBJECTION TO THE AFFIDAVIT OF STEVEN  
WETZEL DATED NOVEMBER 15, 2011 - 4

*Winston & Cashatt*  
A PROFESSIONAL SERVICE CORPORATION  
250 Northwest Blvd., Suite 206  
Coeur d'Alene, Idaho 83814  
Phone: (208) 687-2103

CERTIFICATE OF SERVICE

The undersigned hereby certifies under penalty of perjury under the laws of the State of Idaho that on 22 day of November, 2011, the foregoing was caused to be served on the following persons in the manner indicated:

John R. Layman  
Layman, Layman & Robinson, PLLP  
601 South Division Street  
Spokane, WA 99202

VIA REGULAR MAIL  
VIA CERTIFIED MAIL  
HAND DELIVERED  
BY FACSIMILE 509-624-2902  
BY ELECTRONIC MAIL  
VIA FEDERAL EXPRESS

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Attorney for Defendants BRN Development, BRN Investments,  
BRN-Lake View Joint Venture, Marshall Chesrown, Lake  
View AG, and Robert Levin, Trustee For The Roland M. Casati  
Family Trust, Dated June 5, 2008 and E. Ryker Young, Trustee  
of the E. Ryker Young Revocable Trust

Charles B. Lempesis  
Attorney at Law  
201 W. Seventh Avenue  
Post Falls, ID 83854

VIA REGULAR MAIL  
VIA CERTIFIED MAIL  
HAND DELIVERED  
BY FACSIMILE (208) 773-1044  
BY ELECTRONIC MAIL  
VIA FEDERAL EXPRESS

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☐

Attorney for Defendant Thorco, Inc.

Edward Anson  
Witherspoon, Kelley, Davenport & Toole, P.S.  
608 Northwest Blvd. #300  
Coeur d'Alene, ID 83814

VIA REGULAR MAIL  
VIA CERTIFIED MAIL  
HAND DELIVERED  
BY FACSIMILE (208) 667-8470  
BY ELECTRONIC MAIL  
VIA FEDERAL EXPRESS

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Attorney for Defendants Wadsworth Golf Construction  
Company of the Southwest, The Turf Corporation and  
Precision Irrigation Inc.

Richard Campbell  
Campbell Bissell  
7 South Howard Street #416  
Spokane, WA 99201

VIA REGULAR MAIL  
VIA CERTIFIED MAIL  
HAND DELIVERED  
BY FACSIMILE 509-455-7111  
BY ELECTRONIC MAIL  
VIA FEDERAL EXPRESS

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☐

Attorney for Defendant Polin & Young Construction

Greg Embrey  
Witherspoon, Kelley, Davenport & Toole  
608 Northwest Blvd. #300  
Coeur d'Alene, ID 83814

VIA REGULAR MAIL  
VIA CERTIFIED MAIL  
HAND DELIVERED  
BY FACSIMILE (208) 667-8470  
BY ELECTRONIC MAIL  
VIA FEDERAL EXPRESS

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Attorney for Defendant Taylor Engineering

AMERICAN BANK'S OBJECTION TO THE AFFIDAVIT OF STEVEN  
WETZEL DATED NOVEMBER 15, 2011 - 5

*Winston & Cashatt*  
A PROFESSIONAL SERVICE CORPORATION  
250 Northwest Blvd., Suite 206  
Coeur d'Alene, Idaho 83814  
Phone: (208) 667-2103

1964

1 Randall A. Peterman & C. Clayton Gill  
2 Moffatt, Thomas, Barrett, Rock & Fields, Chartered  
3 101 South Capital Blvd., 10<sup>th</sup> Floor  
4 P.O. Box 829  
Boise, Idaho 83701

VIA REGULAR MAIL ☐  
VIA CERTIFIED MAIL ☐  
HAND DELIVERED ☐  
BY FACSIMILE (208) 385-5384 ☐  
BY ELECTRONIC MAIL ☒  
VIA FEDERAL EXPRESS ☐

5 Co-Attorney for Plaintiff  
6 Doug Marfice  
Ramsden & Lyons  
7 700 Northwest Boulevard  
8 Coeur d'Alene, ID 83816-1336

VIA REGULAR MAIL ☐  
VIA CERTIFIED MAIL ☐  
HAND DELIVERED ☒  
BY FACSIMILE (208) 664-5884 ☐  
BY ELECTRONIC MAIL ☐  
VIA FEDERAL EXPRESS ☐

9 Attorney for Defendant Ryker Young, Trustee of the Ryker  
10 Young Revocable Trust

11 Rick Harris  
12 Ramsden & Lyons  
13 700 Northwest Boulevard  
14 Coeur d'Alene, ID 83816-1336

VIA REGULAR MAIL ☐  
VIA CERTIFIED MAIL ☐  
HAND DELIVERED ☒  
BY FACSIMILE (208) 664-5884 ☐  
BY ELECTRONIC MAIL ☐  
VIA FEDERAL EXPRESS ☐

15 Attorney for Court Appointed Receiver

16 Steven C. Wetzel  
17 James, Vernon & Weeks  
18 1626 Lincoln Way  
19 Coeur d'Alene, ID 83814

VIA REGULAR MAIL ☐  
VIA CERTIFIED MAIL ☐  
HAND DELIVERED ☒  
BY FACSIMILE (208) 664-1684 ☐  
BY ELECTRONIC MAIL ☐  
VIA FEDERAL EXPRESS ☐

20 Attorneys for Third Party Defendant ACI

21   
22 ELIZABETH A. TELLESSEN  
23  
24  
25  
26

AMERICAN BANK'S OBJECTION TO THE AFFIDAVIT OF STEVEN  
WETZEL DATED NOVEMBER 15, 2011 - 6

*Winston & Cashatt*  
A PROFESSIONAL SERVICE CORPORATION  
250 Northwest Blvd., Suite 206  
Coeur d'Alene, Idaho 83814  
Phone: (208) 667-2103

1965

2011 NOV 22 PM 2: 22

CLERK DISTRICT COURT  
*Paul Crumache*  
DEPUTY

NANCY L. ISSERLIS, ISB #7331  
ELIZABETH A. TELLESSEN, ISB #7393  
WINSTON & CASHATT  
250 Northwest Boulevard, Suite 206  
Coeur d'Alene, Idaho 83814  
Telephone: (208) 667-2103  
Facsimile: (208) 765-2121  
nli@winstoncashatt.com & eat@winstoncashatt.com

RANDALL A. PETERMAN, ISB #1944  
C. CLAYTON GILL, ISB # 4973  
MOFFATT, THOMAS, BARRETT, ROCK  
& FIELDS, CHARTERED  
101 South Capital Blvd., 10<sup>th</sup> Floor  
P.O. Box 829  
Boise, Idaho 83701  
Telephone: (208) 345-2000  
Facsimile: (208) 385-5384  
rap@moffatt.com & ccg@moffatt.com

Attorneys for Plaintiff

**IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE  
OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI**

AMERICAN BANK, a Montana banking  
corporation,

Plaintiff,

vs.

BRN DEVELOPMENT, INC., an Idaho  
corporation, BRN INVESTMENTS, LLC, an  
Idaho limited liability company, LAKE VIEW  
AG, a Liechtenstein company, BRN-LAKE  
VIEW JOINT VENTURE, an Idaho general  
partnership, ROBERT LEVIN, Trustee for the  
ROLAND M. CASATI FAMILY TRUST, dated  
June 5, 2008, E. RYKER YOUNG, Trustee for  
the E. RYKER YOUNG REVOCABLE TRUST,  
MARSHALL CHESROWN a single man,  
IDAHO ROOFING SPECIALIST, LLC, an Idaho  
limited liability company, THORCO, INC., an

Case No. CV 09-2619

**AMERICAN BANK'S REPLY  
MEMORANDUM IN SUPPORT OF ITS  
MOTION FOR PARTIAL SUMMARY  
JUDGMENT RE: COUNT 4 OF ACI'S  
CROSS CLAIM**

**ORIGINAL**

AMERICAN BANK'S REPLY MEMORANDUM IN SUPPORT OF ITS  
MOTION FOR PARTIAL SUMMARY JUDGMENT RE: COUNT 4 OF ACI'S  
CROSS CLAIM - 1

*Winston & Cashatt*  
A PROFESSIONAL SERVICE CORPORATION  
250 Northwest Blvd., Suite 206  
Coeur d'Alene, Idaho 83814  
Phone: (208) 667-2103

1966

Idaho corporation, CONSOLIDATED SUPPLY  
COMPANY, an Oregon corporation,  
INTERSTATE CONCRETE & ASPHALT  
COMPANY, an Idaho corporation, CONCRETE  
FINISHING, INC., an Arizona corporation, THE  
TURF CORPORATION, an Idaho corporation,  
WADSWORTH GOLF CONSTRUCTION  
COMPANY OF THE SOUTHWEST, a Delaware  
corporation, POLIN & YOUNG  
CONSTRUCTION, INC., an Idaho corporation,  
TAYLOR ENGINEERING, INC., a Washington  
corporation, PRECISION IRRIGATION, INC.,  
an Arizona corporation and SPOKANE  
WILBERT VAULT CO., a Washington  
corporation, d/b/a WILBERT PRECAST,

Defendants.

And

TAYLOR ENGINEERING, INC., a Washington  
corporation,

Third-Party Plaintiff,

v.

ACI NORTHWEST, INC., an Idaho corporation;  
STRATA, INC., an Idaho corporation; and  
SUNDANCE INVESTMENTS, LLP, a limited  
liability partnership,

Third-Party Defendants.

And

ACI NORTHWEST, INC., an Idaho corporation,

Cross-Claimant,

v.

AMERICAN BANK, a Montana banking  
corporation, BRN DEVELOPMENT, INC., an  
Idaho corporation, BRN INVESTMENTS, LLC,

AMERICAN BANK'S REPLY MEMORANDUM IN SUPPORT OF ITS  
MOTION FOR PARTIAL SUMMARY JUDGMENT RE: COUNT 4 OF ACI'S  
CROSS CLAIM - 2

*Winston & Cashatt*  
A PROFESSIONAL SERVICE CORPORATION  
250 Northwest Blvd., Suite 206  
Coeur d'Alene, Idaho 83814  
Phone: (208) 667-2103

1967



1 an Idaho limited liability company, LAKE VIEW  
2 AG, a Liechtenstein company, BRN-LAKE  
3 VIEW JOINT VENTURE, an Idaho general  
4 partnership, ROBERT LEVIN, Trustee for the  
5 ROLAND M. CASATI FAMILY TRUST, dated  
6 June 5, 2008, E. RYKER YOUNG, Trustee for  
7 the E. RYKER YOUNG REVOCABLE TRUST,  
8 MARSHALL CHESROWN a single man,  
9 THORCO, INC., an Idaho corporation,  
10 CONSOLIDATED SUPPLY COMPANY, an  
11 Oregon corporation, THE TURF  
12 CORPORATION, an Idaho corporation,  
13 WADSWORTH GOLF CONSTRUCTION  
14 COMPANY OF THE SOUTHWEST, a Delaware  
15 corporation, POLIN & YOUNG  
16 CONSTRUCTION, INC., an Idaho corporation,  
17 TAYLOR ENGINEERING, INC., a Washington  
18 corporation and PRECISION IRRIGATION,  
19 INC., an Arizona corporation,

20  
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26  
Cross Claim Defendants.

Plaintiff American Bank submits the following memorandum in support of its Motion for Partial Summary Judgment re: Count 4 of ACI's Cross Claim filed with this Court.

### 1. Introduction

Where it is alleged in summary judgment that a prima facie case has not been made, the party opposing the motion must come forward with specific facts—speculative or conclusory statements are not sufficient. ACI's response offers nothing more than red herrings and speculative and conclusory statements that are not supported by the record. Because ACI has failed to raise a genuine issue of material fact its claims must be dismissed as a matter of law.

### 2. Undisputed Facts

ACI does not dispute a single fact set forth in American Bank's statement of undisputed facts.

(Am.Bnk. Memo for PSJ Re: Count 4, p. 4) Importantly, ACI does not dispute that it relied entirely on AMERICAN BANK'S REPLY MEMORANDUM IN SUPPORT OF ITS MOTION FOR PARTIAL SUMMARY JUDGMENT RE: COUNT 4 OF ACI'S CROSS CLAIM - 3

*Winston & Cashatt*  
A PROFESSIONAL SERVICE CORPORATION  
250 Northwest Blvd., Suite 206  
Coeur d'Alene, Idaho 83814  
Phone: (208) 667-2103

-1968

1 Marshall Chesrown's statements in electing to perform work on Black Rock North, that is never had any  
2 contact with American Bank, that it continued to perform work on Black Rock North even after BRN  
3 Development had failed to pay for work done and even concedes that "the improvements added by ACI  
4 may currently in this depressed market, add nominal to no value ..." to Black Rock North. (ACI's  
5 Memo in Opp. to PSJ Re Count 4, p.17)

6  
7 There is no need for the court to look any further to conclude that there is no genuine issue of  
8 material fact and that ACI's equitable claims seeking a personal judgment against American Bank  
9 should be dismissed as a matter of law.

### 10 3. Speculative and Conclusory Statements

11 ACI's arguments are nothing more than a work of fiction—a story that it wishes to be true, but is not  
12 borne in reality. First, ACI argues that American Bank made this loan with the intent of foreclosing the  
13 property, a "loan to own". However, the truth is easily discerned from the evidence cited by ACI,  
14 including the 30(b)(6) deposition of American Bank's designee, Leon Royer, wherein he stated "I  
15 wasn't looking to foreclosure on this loan...I wanted the project to be successful ...." (ACI's Memo in  
16 Opp. to PSJ Re Count 4, p.14, citing 30(b)(6) Dep. American Bank-L. Royer p. 112, ll. 21-25; p. 113 ll.  
17 1-23).

18  
19 Second, although ACI argues there is some inherent value or benefit that has been provided to and  
20 retained by American Bank, its response is devoid of any evidence of what that might be. The absence  
21 of evidence to support ACI's theory is illuminated by the evidence that is in the record including the  
22 opinions of as-is market value taken from the appraisals of Black Rock North (Aff. B. Klein, Aug. 19,  
23 2011, Exhibits AB-A, AB-D and AB-E; and Aff. D. Paauw, Exhibits PAAUW 2-4); and American  
24 Bank's testimony that "[s]o in round of the figures that I can put out here, [American Bank] lost about  
25  
26

1 \$1.5 million.” (Aff. E. Tellessen 2.3; Am. Bank 30(b)(6), L. Royer p. 84 l. 24- p. 85. 1)<sup>1</sup> Even if the  
2 opinions of as-is market value are stricken, as requested by ACI, there is simply no evidence showing  
3 any benefit conferred upon or retained by American Bank, which is consistent with ACI’s own  
4 contention that the work it did on Black Rock North “add[ed] nominal to no value” to the property.  
5 (ACI’s Memo in Opp. to PSJ Re Count 4, p.17)  
6

7 Third, ACI weaves a tale of American Bank directing BRN Development’s relationships with its  
8 contractors. But, this tale is also contrary to the evidence that shows BRN Development came to  
9 American Bank, having an existing relationship and intent to contract with ACI. (Aff. E. Tellessen 2.3;  
10 Am. Bank 30(b)(6), L. Royer p. 116 ll. 20-24; p. 122 l. 18-p. 123 l. 2; p. 137 ll. 10-24). This is consistent  
11 with Mr. Radobenko’s testimony that he relied on Mr. Chesrown when it came down to getting paid, not  
12 American Bank:  
13

14 Q. [by counsel for ACI, Mr. Wetzel]...would you have done the work for Marshall  
15 Chesrown just based upon Marshall’s statement that he was going to pay for the  
16 job?

17 A. Yes.

18 Q. Oh, you would have?

19 A. Sure.

20 Q. Why?

21 A. Because he’s always paid us in the past.... I might have asked him where is he  
22 going to get the money, but if Marshall said he was going to pay, I wouldn’t have  
23 worried about it.  
24

25 (Aff. E. Tellessen, Aug. 19, 2011, Exhibit AB-1, 30(b)(6) Dep. ACI—W. Radobenko p. 84 ll. 6-17) ACI  
26 states “Ample documentation exists showing American Bank’s involvement such as the January 10,  
2007 letter from Mark Hendrickson to Marshall Chesrown which describes in detail the purpose of the

<sup>1</sup> Although not a named party, a participant in the BRN Development Credit, Rocky Mountain Bank, has lost more than \$1,600,000 in this transaction. Taken together with American Bank’s losses and the expenses of the Receiver, the Participants have lost approximately \$4,000,000 acquiring and maintaining the collateral through foreclosure.

1 loan and where the money loaned was to be applied.” (ACI’s Memo in Opp. to PSJ Re Count 4, p.19)

2 However, what the letter actually says is that the loan can be put to any of the following purposes:

- 3
- 4 1. General operating expenses including interest on the loan,
  - 5 2. The construction of the project’s infrastructure,
  - 6 3. The construction of the project’s golf course; and,
  - 7 4. A distribution to owner to pay existing debt to Bank.

8 (Wetzel Affidavit: 11-15-11; Exhibit E) None of which took priority over any other in the eyes of  
9 American Bank. (Aff. E. Tellessen 2.2; M. Hendrickson p. 177 ll. 8-19). American Bank did nothing  
10 more than make advances in the amounts requested at the time they were requested by BRN  
11 Development. (Aff. E. Tellessen, Aug. 19, 2011¶ 4, 30(b)(6) Dep. BRN Development, p. 30 ref. EX  
12 175; p. 33 ll. 9-12)

13 These stories are relied upon by ACI in its effort to try and prove that American Bank preyed on  
14 BRN Development, ACI and Marshall Chesrown, who were nothing more than unsuspecting north  
15 Idaho neophytes with no ability to protect themselves from the big, bad bank. In reality, both Mr.  
16 Radobenko and Mr. Chesrown were sophisticated and calculating businessmen and users of credit.  
17 They have in concert and separately borrowed tens of millions of dollars that they cannot repay. And,  
18 now Mr. Radobenko wants to pin his failure on American Bank.

19 **4. Legal Authority**

20 Although the standards on summary judgment are well settled, they bear repeating, particularly  
21 where they are directly applicable and still unsatisfied by ACI. First, the non-moving party must come  
22 forward with more than a scintilla of evidence and cannot rely on speculation or conclusory statements,  
23 but rather must come forward with specific facts that create a genuine issue for trial. Van v. Portneuf  
24 Medical Center, 147 Idaho 552, 556, 212 P.3d 982 (2009). Moreover, when the moving party asserts  
25

1 there is no genuine issue of fact as to a particular element of the non-moving party's claim the non-  
2 moving party "must make a showing sufficient to establish the existence of an element essential to the  
3 party's case on which that party will bear the burden of proof at trial." Farm Credit Bank of Spokane v.  
4 Stevenson, 125 Idaho 270, 272-273, 869 P.2d 1365 (1994).

5  
6 ACI fails in respect to both of the above referenced standards. ACI relies almost entirely on  
7 speculation and conclusory statements that are not supported by any specific facts in the record. Further,  
8 American Bank submits in its moving papers deficiencies in the prima facie case of each of the equitable  
9 claims. In particular, there is no evidence of any benefit that has been conferred upon or retained by  
10 American Bank. ACI offers no admissible evidence of a tangible increase in value or benefit to  
11 American Bank, ACI relies solely on its argument that its work equals value, or could result in value  
12 sometime in "the next few years" although American Bank no longer has an interest in Black Rock  
13 North. (ACI's Memo in Opp. to PSJ Re Count 4, p.17) Accordingly, even when viewing all facts in a  
14 light favorable to ACI, there is no genuine issue of material fact for trial. Consequently, its equitable  
15 claims against American Bank are properly dismissed as a matter of law and American Bank's motion  
16 for partial summary judgment should be granted.  
17

18 **4.1 ACI's cannot waive its legal claims against BRN Development and gain the right to pursue**  
19 **equitable claims for a personal judgment against American Bank.**

20 The law of Idaho has long held that a personal judgment cannot be had where there is no  
21 contractual privity. See Mitchell v. Flandro, 95 Idaho 228, 233, 506 P.2d 455 (1972), citing Weeter  
22 Lumber Co. v. Fales, 20 Idaho 255, 118 P. 289 (1911); and see Pierson v. Sewell, 97 Idaho 38, 43-44,  
23 539 P.2d 590 (1975) [owner did not assume contract with subcontractor and thus no basis for a personal  
24 judgment against him]. It is undisputed that there was not even contact let alone a contract between  
25

26 American Bank and ACI and thus no further inquiry is necessary. However, there does exist a contract  
AMERICAN BANK'S REPLY MEMORANDUM IN SUPPORT OF ITS  
MOTION FOR PARTIAL SUMMARY JUDGMENT RE: COUNT 4 OF ACI'S  
CROSS CLAIM - 7

*Winston & Cashatt*  
A PROFESSIONAL SERVICE CORPORATION  
250 Northwest Blvd., Suite 208  
Coeur d'Alene, Idaho 83814  
Phone: (208) 667-2103

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1 between ACI and BRN Development, and where a legal remedy is available equitable claims will not be  
2 considered. Iron Eagle Development, LLC v. Quality Design Systems, Inc., 138 Idaho 487, 492, 65  
3 P.3d 509 (2003).

4 ACI argues that the facts of this case are analogous to the facts of Idaho Lumber, Inc. v. Buck,  
5 and thus it is not required to pursue its breach of contract claim against BRN Development. Idaho  
6 Lumber, 109 Idaho 737, 744, 710 P.2d 647 (1985). However, the facts of Idaho Lumber are materially  
7 different from the facts of this case. First, the contracting party in Idaho Lumber went bankrupt, which  
8 had the effect of discharging all of its obligations and ending the contract. Id. at 744. Such is not the  
9 case here—as the court is aware—BRN Development is still actively pursuing and defending claims for  
10 breach of contract with Taylor Engineering. BRN Development has not filed for bankruptcy; rather it is  
11 ACI asserting that the contract has ended. (ACI's Memo in Opp. to PSJ Re Count 4, pp. 8 & 18)  
12 Although, ACI has apparently chosen not to pursue its legal remedies against BRN Development, this  
13 does not adorn it with the right, in contravention of Idaho law, to pursue equitable claims and a personal  
14 judgment against American Bank. ACI's equitable claims against American Bank are appropriately  
15 dismissed as a matter of law.

18 **4.2 Where there is no evidence of a benefit being conferred upon American Bank a prima facie**  
19 **case of unjust enrichment cannot be made.**

20 American Bank in no way concedes or agrees that any of the elements of a claim of unjust  
21 enrichment have been satisfied by ACI. But, the most glaring omission is the lack of even a scintilla of  
22 evidence that American Bank has gained any benefit, let alone an unjust benefit from ACI. The law of  
23 Idaho irrefutably requires that some measurable benefit be conferred upon the defendant before the  
24 plaintiff can prevail on a claim for summary judgment. See Idaho Lumber, 109 Idaho 737 [proof of  
25 increased value of real property essential to claim for unjust enrichment]. ACI has not offered any

1 evidence that it has conferred a benefit on American Bank. It even admits that the work it did on Black  
2 Rock North added "nominal to no value" to the property.

3 Nevertheless, ACI cites a number of cases in an effort to persuade the court that unjust enrichment  
4 exists in this case. But, the cases cited by ACI wherein claims for unjust enrichment were sustained are  
5 easily distinguishable from the case at bar. Gibson v. Ada County, 142 Idaho 746, 750, 759, 133 P.3d  
6 1211 (2006) [employee received and retained two salaries for two different positions while only working  
7 one]; Pichon v. L.J. Broekemeirer, 108 Idaho 846, 849, 702 P.2d 884 (1985) [foreclosing lender  
8 assumed debtor's contract with plaintiff, and thus lender's failure to pay plaintiff in accordance with  
9 contract resulted in unjust enrichment]; Warm Springs Properties, Inc. v. Andora Villa, Inc., 96 Idaho  
10 270, 526 P.2d 1106 (1974) [contractor's use of funds paid by third party to improve defendant's  
11 property resulted in unjust enrichment to defendant].

12 ACI offers no evidence to establish the existence of the essential element of conferring a benefit.  
13 Further, the evidence offered by American Bank establishes that Black Rock North's value has  
14 consistently declined and that American Bank alone has lost nearly \$1,500,000.00 in this deal. ACI has  
15 failed to meet its burden of providing evidence of an essential element to its claim, and therefore the  
16 claim for unjust enrichment must fail as a matter of law.

17  
18 **4.3 There was no relationship or contact between American Bank and ACI and thus no basis  
to apply the doctrine of quantum meruit.**

19 An essential element of a quantum meruit claim is the promise to pay for performance. Fox v.  
20 Mountain West Elec., Inc., 137 Idaho 703, 708, 52 P.3d 848 (2002). The evidence is unanimous—at no  
21 time did American Bank make any representation to ACI, specifically no representation or promise to  
22 pay it for any work on Black Rock North. Furthermore, Mr. Radobenko, the owner of ACI, admits that  
23 he relied entirely on Marshall Chesrown to pay for the work that ACI performed on Black Rock North.  
24 (Aff. E. Tellessen Ex. AB-1; 30(b)(6) Dep. ACI—W. Radobenko p. 84 ll. 6-17).

25 ACI fails to offer any evidence to establish the existence of the essential element of a promise to pay

1 for ACI's performance. The fact that American Bank knew that BRN Development had selected ACI to  
2 work on Black Rock North is not a material fact to ACI's claim for quantum meruit, there must be some  
3 affirmative conduct by American Bank from which it can be inferred that it promised to pay ACI for its  
4 work. But, there is none. The facts offered by ACI in support of this claim, even when viewed in the  
5 light most favorable to it, show nothing more than American Bank's awareness of BRN Development's  
6 intent to hire ACI to work on Black Rock North, not a promise to pay for the work done on the property.  
7 And thus, ACI's claim for quantum meruit must fail as a matter of law.

8 **4.4 The claim for constructive trust is untimely, improperly asserted, and also fails as a matter**  
9 **of law.**

10 Plaintiff does not dispute the general Idaho case law that "a constructive trust arises where legal  
11 title to property has been obtained through actual fraud, misrepresentations, concealments, taking  
12 advantage of one's necessities, or under circumstances otherwise rendering it unconscionable for the  
13 holder of legal title to retain beneficial interest in the property." Witt v. Jones, 111 Idaho 165, 722 P.2d  
14 474 (1986). However, "[a] constructive trust cannot arise out of vague, indefinite, ambiguous or casual  
15 statements or declarations. It must be established by reasonably clear and definite statements or  
16 declarations or equally clear and definite evidence of acts and conduct to that effect." Dunn v. Dunn, 59  
17 Idaho 473, 474, 83 P.2d 471 (1938). "[T]here must be clear, cogent, convincing evidence to give rise to  
18 a resulting or constructive trust." Erb v. Kohnke, 121 Idaho 328, 335, 824 P.2d 903, 910 (Idaho App.,  
19 1992) (citing Mollendorf v. Derry, 95 Idaho 1, 5, 501 P.2d 199, 203 (1972)). When the burden of proof  
20 is clear and convincing evidence, the court on summary judgment "must view the evidence presented  
21 through the prism of the substantive evidentiary burden." (See e.g. Wiemer v. Rankin, 117 Idaho 566,  
22 574-75, 790 P.2d 347, 355-56 (1990).



1 First, ACI's newly alleged constructive trust theory must be dismissed as ACI failed to properly  
2 plead a basis for or the right to a constructive trust.<sup>2</sup> In its Amended Cross-Claims, ACI did not plead  
3 claim(s) for constructive trust, fraud, misrepresentation, or unconscionability. ACI did not allege a right  
4 to the equitable remedy for a constructive trust in its Cross-Claims prayer for relief. In fact,  
5 "constructive trust" does not appear anywhere in ACI's Answer and Cross-Claims or its Amended  
6 version. The Amended Cross-Claim against American Bank, Count 4, simply states that American  
7 Bank should not be allowed to retain ill-gotten gains, if such gains exist, under theories of unjust  
8 enrichment, quantum meruit, waiver, and/or equitable estoppel. This clearly does not encompass the  
9 separate and distinct claim, theory, or remedy of a constructive trust. ACI's attempt to circumvent the  
10 rules of pleadings by slipping in this new and distinct legal theory in its response brief is untimely and  
11 impermissible according to the Idaho Rules of Civil Procedure.  
12

13  
14 Second, ACI points to no legal authority that in any way supports its claim that American Bank's  
15 actions make it unconscionable for it to retain some perceived beneficial interest in any real or personal  
16 property, i.e. its funds from the sale of the legal title to the property. American Bank has testified that it  
17 lost approximately \$1,500,000 on the BRN Development credit and no longer retains any interest in the  
18 real property. Again, ACI has not provided any evidence to establish American Bank has taken any  
19 property or gain from its dealings with BRN Development and Black Rock North, let alone to the  
20 detriment of ACI. Furthermore, there is no evidence that American Bank acted unconscionably in  
21 gaining legal title to Black Rock North through the judicial foreclosure of its Mortgage, or subsequently  
22

23  
24 <sup>2</sup> ACI's inclusion of the previously unmentioned constructive trust argument is indicative of the tactics employed by ACI and  
25 its counsel in this litigation. Each time ACI has raised an argument against American Bank and it has been defeated, another  
26 unfounded claim appears, out of the blue. This harassing is what has protracted this litigation, consumed many hours of the  
court's time and resulted in American Bank's being forced to defend all manner of unfound claims at considerable  
unnecessary expense.

1 selling that interest. In sum, there is no factual or legal basis to support that "unconscionable"  
2 circumstances have been established that would support imposition of a constructive trust.

3 "Unconscionable" is a word of art used primarily in connection with contracts whether there was  
4 extreme unfairness in bargaining for or carrying out the contract. See Black's Law Dictionary 1526 (7<sup>th</sup>  
5 ed. 1999). Or more generally the term is used to describe "[t]he moral sense of discriminating between  
6 right and wrong as particularly applied to one's perception of his own conduct." Sanchez v. Galey, 115  
7 Idaho 1064, 1079, 772 P.2d 702, 717 (1989).  
8

9 There is nothing wrong with what American Bank has done to foreclose its interests in Black  
10 Rock North. In fact, the evidence and circumstances surrounding this case simply establish that ACI  
11 unfortunately suffered a bad bargain by apparently not timely obtaining payment for its work from BRN  
12 Development, and now attempts to recoup its losses for its bad bargain from the only source it sees with  
13 funds to pay. But, even if a transaction is inherently unfair, the doctrine of inequity "does not operate to  
14 rescue a party from the consequences of a bargain which turns out to be a bad one." Independent School  
15 Dist. of Boise v. Harris Family Limited Partnership, 150 Idaho 583, 249 P.3d 382 (2011). Therefore,  
16 ACI's claim/theory/remedy for constructive trust should not be considered and should be dismissed,  
17 barring ACI from putting on any evidence of a constructive trust in the future if this matter is not fully  
18 resolved on summary judgment.  
19

20 **4.5 ACI does not dispute that its claims of waiver and equitable estoppel must be dismissed as**  
21 **a matter of law.**

22 American Bank is entitled to summary judgment on the issues of waiver and equitable estoppel  
23 because ACI has not responded or presented a genuine issue of material fact as to either theory. IRCP  
24 56(c). Thus, ACI has waived, by its failure to respond, the right to offer any evidence of a genuine issue  
25 of material fact as to these claims, and therefore an order and judgment dismissing the same should be  
26

1 entered forthwith.

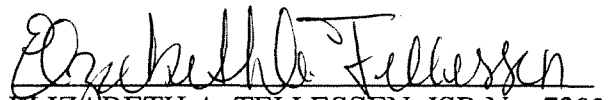
2  
3 **4.6 American Bank is entitled to a judgment for its costs, expenses and reasonable attorneys' fees as a matter of law.**

4 ACI does not dispute that American Bank is entitled to an award of its costs, expenses and  
5 reasonable attorneys' fees, and thus upon the court granting American Bank's motion for partial  
6 summary judgment in whole or in part a judgment for fees should be entered. IRCP 56(c), IC 12-120  
7 and 12-121. By failing to respond ACI has waived the right to offer any evidence of a genuine issue of  
8 material fact as to American Bank's right to collect its costs, expenses, and reasonable attorneys' fees  
9 these claims and therefore an order granting the same should be entered forthwith. American Bank  
10 requests leave of the court to submit an affidavit for fees following entry of the order.

11 **5. Conclusion**

12 Partial summary judgment is properly granted in favor of American Bank dismissing all of ACI's  
13 equitable claims as a matter of law. First, because ACI has legal remedies available to it, it cannot  
14 pursue equitable remedies against American Bank. Second, ACI has failed to come forward with the  
15 requisite evidence establishing essential elements of its claims that it will bear the burden of proof on at  
16 trial. And third, disregarding the speculative and conclusory statements, even if all of the facts are  
17 viewed in favor of ACI a reasonable person could reach only one conclusion: American Bank at all  
18 times acted with the law and bounds of equity in extending credit to BRN Development, and then  
19 recapturing the collateral at considerable expense after BRN Development's default, and such does not  
20 give rise to liability for the harms allegedly suffered by ACI.

21 DATED this 22 day of November, 2011.

22  
23   
24 ELIZABETH A. TELLESSEN, ISB No. 7393  
25 WINSTON & CASHATT  
26 Attorneys for Plaintiff American Bank

AMERICAN BANK'S REPLY MEMORANDUM IN SUPPORT OF ITS  
MOTION FOR PARTIAL SUMMARY JUDGMENT RE: COUNT 4 OF ACI'S  
CROSS CLAIM - 13

*Winston & Cashatt*  
A PROFESSIONAL SERVICE CORPORATION  
250 Northwest Blvd., Suite 206  
Coeur d'Alene, Idaho 83814  
Phone: (208) 667-2103

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CERTIFICATE OF SERVICE

The undersigned hereby certifies under penalty of perjury under the laws of the State of Idaho that on 22 day of November, 2011, the foregoing was caused to be served on the following persons in the manner indicated:

John R. Layman  
Layman, Layman & Robinson, PLLP  
601 South Division Street  
Spokane, WA 99202

VIA REGULAR MAIL ☐  
VIA CERTIFIED MAIL ☐  
HAND DELIVERED ☒  
BY FACSIMILE 509-624-2902 ☐  
BY ELECTRONIC MAIL ☐  
VIA FEDERAL EXPRESS ☐

Attorney for Defendants BRN Development, BRN Investments,  
BRN-Lake View Joint Venture, Marshall Chesrown, Lake  
View AG, and Robert Levin, Trustee For The Roland M. Casati  
Family Trust, Dated June 5, 2008 and E. Ryker Young, Trustee  
of the E. Ryker Young Revocable Trust

Charles B. Lempesis  
Attorney at Law  
201 W. Seventh Avenue  
Post Falls, ID 83854

VIA REGULAR MAIL ☐  
VIA CERTIFIED MAIL ☐  
HAND DELIVERED ☐  
BY FACSIMILE (208) 773-1044 ☐  
BY ELECTRONIC MAIL ☒  
VIA FEDERAL EXPRESS ☐

Attorney for Defendant Thorco, Inc.

Edward Anson  
Witherspoon, Kelley, Davenport & Toole, P.S.  
608 Northwest Blvd. #300  
Coeur d'Alene, ID 83814

VIA REGULAR MAIL ☐  
VIA CERTIFIED MAIL ☐  
HAND DELIVERED ☒  
BY FACSIMILE (208) 667-8470 ☐  
BY ELECTRONIC MAIL ☐  
VIA FEDERAL EXPRESS ☐

Attorney for Defendants Wadsworth Golf Construction  
Company of the Southwest, The Turf Corporation and  
Precision Irrigation Inc.

Richard Campbell  
Campbell Bissell  
7 South Howard Street #416  
Spokane, WA 99201

VIA REGULAR MAIL ☐  
VIA CERTIFIED MAIL ☐  
HAND DELIVERED ☒  
BY FACSIMILE 509-455-7111 ☐  
BY ELECTRONIC MAIL ☐  
VIA FEDERAL EXPRESS ☐

Attorney for Defendant Polin & Young Construction

Greg Embrey  
Witherspoon, Kelley, Davenport & Toole  
608 Northwest Blvd. #300  
Coeur d'Alene, ID 83814

VIA REGULAR MAIL ☐  
VIA CERTIFIED MAIL ☐  
HAND DELIVERED ☒  
BY FACSIMILE (208) 667-8470 ☐  
BY ELECTRONIC MAIL ☐  
VIA FEDERAL EXPRESS ☐

Attorney for Defendant Taylor Engineering

AMERICAN BANK'S REPLY MEMORANDUM IN SUPPORT OF ITS  
MOTION FOR PARTIAL SUMMARY JUDGMENT RE: COUNT 4 OF ACI'S  
CROSS CLAIM - 14

*Winston & Cashatt*  
A PROFESSIONAL SERVICE CORPORATION  
250 Northwest Blvd., Suite 206  
Coeur d'Alene, Idaho 83814  
Phone: (208) 667-2103

1979

Randall A. Peterman & C. Clayton Gill  
Moffatt, Thomas, Barrett, Rock & Fields, Chartered  
101 South Capital Blvd., 10<sup>th</sup> Floor  
P.O. Box 829  
Boise, Idaho 83701

VIA REGULAR MAIL  
VIA CERTIFIED MAIL  
HAND DELIVERED  
BY FACSIMILE (208) 385-5384  
BY ELECTRONIC MAIL  
VIA FEDERAL EXPRESS

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Co-Attorney for Plaintiff  
Doug Marfice  
Ramsden & Lyons  
700 Northwest Boulevard  
Coeur d'Alene, ID 83816-1336

VIA REGULAR MAIL  
VIA CERTIFIED MAIL  
HAND DELIVERED  
BY FACSIMILE (208) 664-5884  
BY ELECTRONIC MAIL  
VIA FEDERAL EXPRESS

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Attorney for Defendant Ryker Young, Trustee of the Ryker  
Young Revocable Trust

Rick Harris  
Ramsden & Lyons  
700 Northwest Boulevard  
Coeur d'Alene, ID 83816-1336

VIA REGULAR MAIL  
VIA CERTIFIED MAIL  
HAND DELIVERED  
BY FACSIMILE (208) 664-5884  
BY ELECTRONIC MAIL  
VIA FEDERAL EXPRESS

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Attorney for Court Appointed Receiver

Steven C. Wetzel  
James, Vernon & Weeks  
1626 Lincoln Way  
Coeur d'Alene, ID 83814

VIA REGULAR MAIL  
VIA CERTIFIED MAIL  
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BY FACSIMILE (208) 664-1684  
BY ELECTRONIC MAIL  
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Attorneys for Third Party Defendant ACI

  
ELIZABETH A. TELLESSEN

AMERICAN BANK'S REPLY MEMORANDUM IN SUPPORT OF ITS  
MOTION FOR PARTIAL SUMMARY JUDGMENT RE: COUNT 4 OF ACI'S  
CROSS CLAIM - 15

*Winston & Cashatt*  
A PROFESSIONAL SERVICE CORPORATION  
250 Northwest Blvd., Suite 208  
Coeur d'Alene, Idaho 83814  
Phone: (208) 667-2103

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2011 NOV 22 PM 2: 24

CLERK DISTRICT COURT

DEPUTY

1 NANCY L. ISSERLIS, ISB #7331  
2 ELIZABETH A. TELLESSEN, ISB #7393  
3 WINSTON & CASHATT  
4 250 Northwest Boulevard, Suite 206  
5 Coeur d'Alene, Idaho 83814  
6 Telephone: (208) 667-2103  
7 Facsimile: (208) 765-2121  
8 nli@winstoncashatt.com & eat@winstoncashatt.com

9 RANDALL A. PETERMAN, ISB #1944  
10 C. CLAYTON GILL, ISB # 4973  
11 MOFFATT, THOMAS, BARRETT, ROCK  
12 & FIELDS, CHARTERED  
13 101 South Capital Blvd., 10<sup>th</sup> Floor  
14 P.O. Box 829  
15 Boise, Idaho 83701  
16 Telephone: (208) 345-2000  
17 Facsimile: (208) 385-5384  
18 rap@moffatt.com & ccg@moffatt.com

19 Attorneys for Plaintiff

20 **IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE**  
21 **OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI**

22 AMERICAN BANK, a Montana banking  
23 corporation,

24 Plaintiff,

25 vs.

26 BRN DEVELOPMENT, INC., an Idaho  
corporation, BRN INVESTMENTS, LLC, an  
Idaho limited liability company, LAKE VIEW  
AG, a Liechtenstein company, BRN-LAKE  
VIEW JOINT VENTURE, an Idaho general  
partnership, ROBERT LEVIN, Trustee for the  
ROLAND M. CASATI FAMILY TRUST, dated  
June 5, 2008, E. RYKER YOUNG, Trustee for  
the E. RYKER YOUNG REVOCABLE TRUST,  
MARSHALL CHESROWN a single man,  
IDAHO ROOFING SPECIALIST, LLC, an Idaho  
limited liability company, THORCO, INC., an  
Idaho corporation, CONSOLIDATED SUPPLY

Case No. CV 09-2619

**AFFIDAVIT OF BRYAN KLEIN IN  
RESPONSE TO ACI'S MOTION TO STRIKE**

**ORIGINAL**

1 COMPANY, an Oregon corporation,  
2 INTERSTATE CONCRETE & ASPHALT  
3 COMPANY, an Idaho corporation, CONCRETE  
4 FINISHING, INC., an Arizona corporation, THE  
5 TURF CORPORATION, an Idaho corporation,  
6 WADSWORTH GOLF CONSTRUCTION  
7 COMPANY OF THE SOUTHWEST, a Delaware  
8 corporation, POLIN & YOUNG  
9 CONSTRUCTION, INC., an Idaho corporation,  
10 TAYLOR ENGINEERING, INC., a Washington  
11 corporation, PRECISION IRRIGATION, INC.,  
12 an Arizona corporation and SPOKANE  
13 WILBERT VAULT CO., a Washington  
14 corporation, d/b/a WILBERT PRECAST,  
15 Defendants.

16 And

17 TAYLOR ENGINEERING, INC., a Washington  
18 corporation,

19 Third-Party Plaintiff,

20 v.

21 ACI NORTHWEST, INC., an Idaho corporation;  
22 STRATA, INC., an Idaho corporation; and  
23 SUNDANCE INVESTMENTS, LLP, a limited  
24 liability partnership,

25 Third-Party Defendants.

26 And

ACI NORTHWEST, INC., an Idaho corporation,

Cross-Claimant,

v.

AMERICAN BANK, a Montana banking  
corporation, BRN DEVELOPMENT, INC., an  
Idaho corporation, BRN INVESTMENTS, LLC,  
an Idaho limited liability company, LAKE VIEW  
AG, a Liechtenstein company, BRN-LAKE

1 VIEW JOINT VENTURE, an Idaho general  
2 partnership, ROBERT LEVIN, Trustee for the  
3 ROLAND M. CASATI FAMILY TRUST, dated  
4 June 5, 2008, E. RYKER YOUNG, Trustee for  
5 the E. RYKER YOUNG REVOCABLE TRUST,  
6 MARSHALL CHESROWN a single man,  
7 THORCO, INC., an Idaho corporation,  
8 CONSOLIDATED SUPPLY COMPANY, an  
9 Oregon corporation, THE TURF  
10 CORPORATION, an Idaho corporation,  
11 WADSWORTH GOLF CONSTRUCTION  
12 COMPANY OF THE SOUTHWEST, a Delaware  
13 corporation, POLIN & YOUNG  
14 CONSTRUCTION, INC., an Idaho corporation,  
15 TAYLOR ENGINEERING, INC., a Washington  
16 corporation and PRECISION IRRIGATION,  
17 INC., an Arizona corporation,

18 Cross Claim Defendants.

19 STATE OF MONTATAN )  
20 : ss.  
21 County of Gallatin )

22 I, BRYAN KLEIN, have firsthand knowledge of the following, and therefore, duly sworn on  
23 oath deposes and says:

24 1. I am the President of American Bank, and have held that role since October 2008. My  
25 duties as president include knowing and understanding our document preservation and retention policy,  
26 as well as management of various credits, including but not limited to the BRN Development credit.

27 2. I started my employment with American Bank on July 17, 2007. I replaced the prior  
28 Chief Operating Officer, Mark Hendrickson and took over all of his credit and loan files, which included  
29 the BRN Development credit. Because the BRN Development credit was relatively new to the bank and  
30 an active account it was a priority to quickly become acquainted with the credit. From July 17, 2007  
31 forward I was primarily responsible for all matters related to that credit throughout the life of the loan.

AFFIDAVIT OF BRYAN KLEIN - 3



1           3.     The BRN Development credit file, both paper and electronic, is and has been continually  
2 in the control and custody of American Bank, and me in particular. Although other bank officers were  
3 involved in the administration and management of the credit, I was primarily responsible for oversight  
4 until American Bank's interest was sold on June 1, 2011.

5           4.     Each of the documents attached as exhibits to my affidavit, including the three complete  
6 appraisals of Black Rock North are records of American Bank that have been created by or transmitted  
7 to American Bank in the course of regularly conducted business activity and it is the regular practice of  
8 American Bank to rely on, preserve and retain these records.

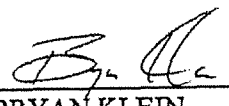
9           5.     Although other bank officers and agents, including Leon Royer, have had direct and  
10 firsthand contact with the BRN Development credit and the file, I am fully competent to testify as to all  
11 documents contained in the file based on both firsthand knowledge and as a designee authorized to  
12 speak on behalf of American Bank.

13           6.     In order to correct my prior affidavit dated August 19, 2011, I have attached hereto as  
14 **Exhibit AB- C.1** the Revolving Credit Agreement, as modified, entered into by BRN Development and  
15 American Bank. By inadvertence the Revolving Credit Note, instead of the Revolving Credit Agreement  
16 was previously attached as Exhibit AB-C to my affidavit dated August 19, 2011.

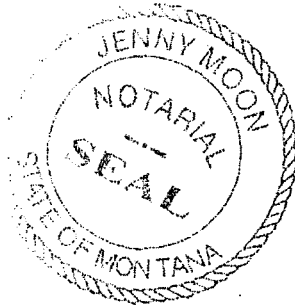
17           7.     The three opinions of value attached to my prior affidavit are part of the appraisals  
18 requested by and provided to American Bank. The engagement letters created and sent by American  
19 Bank requesting the appraisals are attached hereto as **Exhibit AB – F (AB002132-33, AB004823-24**  
20 **and AB005006-07)**. These opinions of value, while not complete appraisals, contain the respective as-is  
21 market values of Black Rock North, upon which American Bank relied in making its business decisions  
22 related to the BRN Development credit. It is the common and customary practice of American Bank to  
23 rely on the opinions of value contained in appraisals in making business decisions.

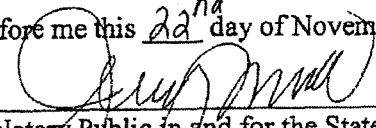
1 8. On one occasion American Bank requested that Mr. Paauw appraise Black Rock North,  
2 but the order was cancelled at the request of Mr. Chesrown. The attached email, Exhibit AB-G  
3 (AB003418) was sent in relation to that occurrence.

4 DATED this 22<sup>nd</sup> day of November, 2011.

5  
6   
7 BRYAN KLEIN

8 SUBSCRIBED AND SWORN TO before me this 22<sup>nd</sup> day of November, 2011.



  
Notary Public in and for the State  
of Montana, residing in Baeman.  
My appointment expires 01-02-2012.

AFFIDAVIT OF BRYAN KLEIN - 5

1985

CERTIFICATE OF SERVICE

The undersigned hereby certifies under penalty of perjury under the laws of the State of Idaho that on 20 day of November, 2011, the foregoing was caused to be served on the following persons in the manner indicated:

John R. Layman  
Layman, Layman & Robinson, PLLP  
601 South Division Street  
Spokane, WA 99202

VIA REGULAR MAIL  
VIA CERTIFIED MAIL  
HAND DELIVERED  
BY FACSIMILE 509-624-2902  
BY ELECTRONIC MAIL  
VIA FEDERAL EXPRESS

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Attorney for Defendants BRN Development, BRN Investments, BRN-Lake View Joint Venture, Marshall Chesrown, Lake View AG, and Robert Levin, Trustee For The Roland M. Casati Family Trust, Dated June 5, 2008 and E. Ryker Young, Trustee of the E. Ryker Young Revocable Trust

Charles B. Lempesis  
Attorney at Law  
201 W. Seventh Avenue  
Post Falls, ID 83854

VIA REGULAR MAIL  
VIA CERTIFIED MAIL  
HAND DELIVERED  
BY FACSIMILE (208) 773-1044  
BY ELECTRONIC MAIL  
VIA FEDERAL EXPRESS

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Attorney for Defendant Thorco, Inc.

Edward Anson  
Witherspoon, Kelley, Davenport & Toole, P.S.  
608 Northwest Blvd. #300  
Coeur d'Alene, ID 83814

VIA REGULAR MAIL  
VIA CERTIFIED MAIL  
HAND DELIVERED  
BY FACSIMILE (208) 667-8470  
BY ELECTRONIC MAIL  
VIA FEDERAL EXPRESS

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Attorney for Defendants Wadsworth Golf Construction Company of the Southwest, The Turf Corporation and Precision Irrigation Inc.

Richard Campbell  
Campbell Bissell  
7 South Howard Street #416  
Spokane, WA 99201

VIA REGULAR MAIL  
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BY FACSIMILE 509-455-7111  
BY ELECTRONIC MAIL  
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Attorney for Defendant Polin & Young Construction

Greg Embrey  
Witherspoon, Kelley, Davenport & Toole  
608 Northwest Blvd. #300  
Coeur d'Alene, ID 83814

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Attorney for Defendant Taylor Engineering

1 Randall A. Peterman & C. Clayton Gill  
2 Moffatt, Thomas, Barrett, Rock & Fields, Chartered  
3 101 South Capital Blvd., 10<sup>th</sup> Floor  
4 P.O. Box 829  
Boise, Idaho 83701

5 Co-Attorney for Plaintiff

6 Doug Marfice  
7 Ramsden & Lyons  
8 700 Northwest Boulevard  
9 Coeur d'Alene, ID 83816-1336

10 Attorney for Defendant Ryker Young, Trustee of the Ryker  
11 Young Revocable Trust

12 Rick Harris  
13 Ramsden & Lyons  
14 700 Northwest Boulevard  
15 Coeur d'Alene, ID 83816-1336

16 Attorney for Court Appointed Receiver

17 Steven C. Wetzel & Kevin P. Holt  
18 James, Vernon & Weeks  
19 1626 Lincoln Way  
20 Coeur d'Alene, ID 83814


21 Attorneys for Third Party Defendant ACI

VIA REGULAR MAIL ☐  
VIA CERTIFIED MAIL ☐  
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BY FACSIMILE (208) 385-5384 ☐  
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ELIZABETH A. TELLESSEN



Bryan J. Klein  
Chief Operating Officer

June 18, 2008

Mr. Marshall Chesrown, President  
BRN Development, LLC  
1450 Northwest Blvd., Suite 302  
Coeur d'Alene, Idaho 83814

Dear Marshall:

Thank you for providing the documents associated with the Securities Purchase and Sales Agreements and the Joint Venture Agreement (the "Agreements"). Although I have discussed this with you and Sam, to appropriately document our agreement, this letter is necessary to confirm certain waivers and changes in the Revolving Credit Agreement.

As discussed, BRN Development, LLC's ("BRN") entry to the Agreements breach certain terms of the Revolving Credit Agreement dated February 2, 2007. American Bank consents to BRN entering into the Agreements and the associated Guaranty and Mortgage in the form and on the terms, provided to us. The consent is subject to BRN's confirmation in writing that BRN will not transfer or convey any interest in any real property or other assets to the joint venture or to Lake View AG, except only for the mortgage interests under the Mortgage, until the lien and other interests in the real property or other assets have been released by American Bank.

American Bank and BRN also agree to replace Schedule 2.2 Parcel Reduction Amounts of the Revolving Credit Agreement with the Revised Schedule 2.2, dated June 18, 2008, which is attached to this letter.

If you agree with the terms of this letter, please sign it in the space provided below and return it to my attention on or before June 25, 2008. Upon return of this signed letter, the Revolving Credit Agreement will be amended to include the terms of this letter.

We appreciate your business and look forward to your continued success.

Sincerely,

Accepted and agreed to by:  
BRN Development, LLC

  
Marshall R. Chesrown, President

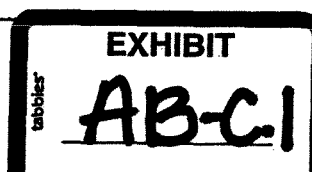
P.O. Box 1970 • 1612 West Main Street • Bozeman, MT 59711-1970  
406.522.3538 • Fax 406.522.3577 • bklein@americanbankmontana.com

**DEPOSITION  
EXHIBIT**

Chesrown #173

6-23-10 PP 20

Confidentiality  
Waived



1988

AB002443

REVISED SCHEDULE 2.2  
PARCEL REDUCTION AMOUNTS  
June 18, 2008

Parcel	Final Plat Number of Units	Release Price per Unit	Release Price per acre
A			40,000
B			30,000
C			20,000
I	8	95,051	
II	21	83,283	
III	36	60,592	
IV	32	54,122	
1	24	124,644	
2	28	119,348	
3	4	260,000	
4	12	199,870	
5	11	114,532	
6	32	229,553	
7	4	212,914	
9	21	125,571	
10	20	132,790	
11	18	93,555	
12	17	122,138	
13	10	134,815	
14	4	153,375	
15	10	57,200	
16	13	181,888	
TOTAL	325		



December 14, 2007

BRN Development, Inc.  
Marshall R. Chesrown, President  
P.O. Box 3070  
Coeur d'Alene, ID 83816

**RE: Waiver of Default under Revolving Credit Agreement dated February 2, 2007**  
**Delivery via mail**

Dear Marshall:

This letter is delivered pursuant to the Revolving Credit Agreement dated as of February 2, 2007 by and among American Bank as Lender, BRN Development, Inc. as Borrower.

The Borrower has requested that the Lender temporarily waive Sections 6.1, Restriction on Certain Actions (paragraphs 1 and 4), and 7.1, Events of Default (paragraph 10) of the Revolving Credit Agreement so that the Borrower can pursue a sale of 30% of the Borrowers stock to a third party. By this letter, Lender hereby agrees to temporarily waive this default and thereby allow for the on time sale/transfer of up to 30% of Borrower's stock, either voting or nonvoting.

The withholding of the exercise of its rights afforded under the Revolving Credit Agreement is not, and is not intended to be, a waiver to pursue remedies with respect to the Borrower, any Guarantor or any other person at any time in the future or with respect to any other events of default.

Sincerely,

A handwritten signature in black ink, appearing to read "B. Klein", written over a horizontal line.

Bryan Klein  
Executive Vice President  
Chief Operating Officer

Borrower hereby agrees to the temporary waiver of covenants described under Sections 6.1 and 7.1 of the Revolving Credit Agreement.

A handwritten signature in black ink, appearing to read "Marshall R. Chesrown", written over a horizontal line.

\_\_\_\_\_, President  
Marshall R. Chesrown

Date: 12-17, 2007.

## REVOLVING CREDIT AGREEMENT

THIS REVOLVING CREDIT AGREEMENT ("Agreement") is effective as of February 2, 2007 (the "Effective Date") between BRN Development, Inc. an Idaho corporation ("Borrower") and American Bank, a Montana banking corporation ("Lender").

### RECITALS:

- A. Borrower owns certain real property located in Kootenai County, Idaho commonly referred to as the "Black Rock North" development. Borrower is developing the real property by, among other things, the construction of a golf course and equestrian facility and related improvements and the subdivision of the property for the sale of residential parcels.
- B. Borrower has requested that Lender make available to Borrower an extension of credit and to advance from time to time funds for the construction of improvements and the development of the real property in the ordinary course of Borrower's business.
- C. Lender has agreed to provide Borrower the requested extension of credit on the terms and covenants of this Agreement.

IN CONSIDERATION OF THE ABOVE, the parties agree as follows:

1.0 Defined Terms. As used in this Agreement, capitalized terms have the following meanings:

"Affiliate" means (a) a Shareholder and (b) any Person controlled by, controlling or under common control with Borrower or a Shareholder and, including, without limitation, BRN Investments. The term "control" means the possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of a Person, whether through the ownership of voting securities or membership interests, by contract, or otherwise including, without limitation, the ownership or control of ten percent (10%) or more of the equity, membership or voting interests in any entity.

"Agreement" means this Revolving Credit Agreement, as amended, supplemented, or modified from time to time.

"Appraisal" means the appraisal prepared by the Appraiser relating to the Real Property and dated as of December 4, 2006, or such later appraisals as Lender may accept from time to time.

"Appraiser" means Cushman & Wakefield of Colorado, Inc. or such other appraiser consented to by Lender.



"Black Rock Management Contract" means the Services and Management Contract between Borrower and Black Rock Development, Inc. dated as of December 1, 2006 and in the form provided by Borrower to Lender.

"BRN Investments" means BRN Investments, LLC, an Idaho limited liability company.

"BRN Mortgage" means the Mortgage dated as of January 5, 2007 securing the payment of the BRN Note and encumbering the Real Property or part thereof.

"BRN Note" means the promissory note dated as of January 5, 2007 in the initial principal balance of Thirty Million One Hundred Ninety-Two Thousand Five Hundred Dollars (\$30,192,500.00) delivered by Borrower to BRN Investments, as the same may be renewed, extended or amended with the prior written consent of Lender.

"Business Day" means any day other than a Saturday, Sunday, or other day on which commercial banks in Montana are authorized or required to close.

"Change in Control" means any event the effect of which is to (a) cause Marshall Chesrown to beneficially own and have the power to vote less than eighty percent (80%) of all classes of the then outstanding voting securities of Borrower and (b) to cause Robert Samuel to beneficially own and have the power to vote, collectively, less than twenty percent (20%) of all classes of the then outstanding voting securities of Borrower.

"Chesrown Debt" means the obligations of Borrower to Marshall R. Chesrown under a Promissory Note dated as of July 11, 2006 in the face amount of \$3,500,000.00.

"Collateral" means all assets and properties of Borrower in which a mortgage lien, pledge, security interest, assignment or other lien is granted under the Mortgage.

"Commitment" means the Lender's obligation to make Loans to the Borrower pursuant to Section 2.0.

"Construction Budget" means a budget setting forth the estimated costs of construction of the Project together with supporting documentation, contracts, bids, invoices or similar items requested by Lender.

"Default Interest Rate" means the Interest Rate plus 500 basis points (5%).

"Entitlements" means the licenses, permits, approvals or other authorities necessary for the construction of the Project and the development of the Real Property in accordance with the Plans.

"Event of Default" means any of the events specified in Section 7.0, provided that any requirement for the giving of notice, the lapse of time, or both, or any other condition, has been satisfied.

"Existing Debt" means (a) the indebtedness of Borrower to Lender evidenced by Promissory Note No. 6405989 and (b) the indebtedness of Robert Samuel to Lender evidenced by Promissory Note No. 6405812.

"Funding Account" means the deposit account, if any, maintained by Borrower with Lender and designated as the funding account by Borrower with the consent of Lender.

"GAAP" means generally accepted accounting principles in the United States.

"Guarantor" means Marshall R. Chesrown, individually.

"Guaranty" means the agreement or agreements entered by the Guarantor and guarantying the obligations of Borrower to Lender.

"Intercompany Agreement(s)" means the agreements and instruments between Borrower and BRN Investments, or delivered by Borrower to BRN Investments and relating to, among other things, the purchase of the Real Property by Borrower and the payment of amounts due or to become due with respect to such purchase and including, without limitation, the BRN Note and the BRN Mortgage.

"Interest Rate" as defined in Section 2.5.

"Laws" means all federal, state and local statutes, regulations, ordinances and requirements, and any decisions, judgments, writs or orders applicable to Borrower or the Real Property, or the conduct of any activity in, under or upon the Real Property including, without limitation, laws relating to subdivision, sanitation, zoning and use and the protection of the environment.

"Letter of Credit" means a letter of credit issued by the Lender upon application of Borrower in accordance with this Agreement.

"Lien" means any mortgage, deed of trust, pledge, security interest, hypothecation, assignment, deposit arrangement, encumbrance, lien (statutory or other), or preference, priority, or other security agreement or preferential arrangement, charge, or encumbrance of any kind or nature whatsoever (including, without limitation, any conditional sale or other title retention agreement, any financing lease having substantially the same economic effect as any of the foregoing, and the filing of any financing statement under the Uniform Commercial Code or comparable law of any jurisdiction to evidence any of the foregoing).

"Line" means the line of credit established by Lender under Section 2.1 of this Agreement.

"Loans" means (a) each and all advances under the Line made to or for the benefit of Borrower or as otherwise contemplated by this Agreement and (b) amounts drawn under a Letter of Credit.

"Loan Documents" means this Agreement, the Mortgage, the Note, the Subordination Agreement, the Guaranty, any Letter of Credit and any document or instrument required or contemplated by the foregoing.

"Loan Fee" means the sum of Seventy-Five Thousand Dollars (\$75,000.00).

"Loan Request" means as defined in Section 2.3.1.

"Lot" means a portion of the Real Property divided in accordance with and available for sale or other disposition as a separate legally described parcel under governing law and identified from time to time by Borrower, with the reasonable consent of Lender, as a Lot.

"Material Contracts" means the agreements entered by Borrower for the construction of improvements or the placement of fixtures upon the Real Property in furtherance of the Project including, without limitation, the contracts identified on Schedule 1 attached.

"Maturity Date" means the first anniversary of the Effective Date.

"Maximum Balance" means Fifteen Million Dollars (\$15,000,000.00) as the same may be reduced in accordance with this Agreement.

"Mortgage" means the Mortgage, Security Agreement and Fixture Filing delivered by Borrower in the form required by Lender.

"Note" as defined in Section 2.7.

"Permitted Encumbrances" means encumbrances on or exceptions to Borrower's title for the Real Property acceptable to Lender in its sole discretion.

"Permitted Purpose" means (a) the payment of Borrower operating expenses incurred in the ordinary course of Borrower's business and relating to the development of the Real Property and including, without limitation, (i) amounts due under the Black Rock Management Contract and (ii) amounts incurred under agreements or contracts with Affiliates entered in the ordinary course of business and on terms and prices consistent with agreements between nonaffiliated parties, (b) the payment of interest on the Loans under the Note, and (c) the payment of direct costs and expenses incurred in the construction of the Project in accordance with the Entitlements and the Plans.

"Person" means an individual, partnership, corporation, business trust, joint stock company, trust, unincorporated association, joint venture, governmental authority, or other entity of whatever nature.

"Plans" means, collectively, the final order and decision of the Board of Commissioners of Kootenai County, Idaho on PUD #055-05 dated August 10, 2006, together with the documents and instruments referred to therein, and the Conceptual Land Use Diagram dated November 18, 2005.

"Prime Rate" means (a) the prime rate of interest of major New York banks as published from time to time in the Money Rates section of the Wall Street Journal, Western Edition or (b) if the Wall Street Journal ceases publication of the "Money Rates" section or ceases quotation of a "Prime Rate", Lender shall, in its sole and absolute discretion, select the prime rate of a money-center bank as a substitute Prime Rate.

"Project" means the construction or other installation of infrastructure and improvements upon the Real Property, for the development of the golf course and equestrian center, or relating to the subdivision of the Real Property into Lots, all in accordance with the Entitlements and the Plans.

"Released Lot" means as defined in Section 4.2.

"Real Property" means the real property described in the Mortgage and being approximately 1,001 acres.

"Samuel Debt" means the obligations of Borrower to Robert C. Samuel under a Promissory Note dated as of July 11, 2006 in the face amount of \$3,150,000.00

"Shareholder" means any person holding, legally or beneficially, any shares of voting or non-voting stock of Borrower, of any class or series.

"Subordination Agreement" means an agreement of BRN Investments, in form and substance satisfactory to Lender, and subordinating (a) the BRN Note, (b) the Lien of the BRN Mortgage and (c) the other obligations of Borrower to BRN Investments, to the obligations of Borrower to Lender under the Loan Documents and the Liens of Lender.

"Survey" means an ALTA/ ACSM survey of the Real Property, identifying all encumbrances or similar items of record, and otherwise sufficient for the issuance of a lender's policy insuring the lien of the Mortgage together with endorsements commonly referred to as an "extended policy".

"Tax Distributions" means distributions on or with respect to the then issued and outstanding stock of Borrower in an amount reasonably determined by Borrower to be equivalent to the state or federal income tax liability of a Shareholder arising from the tax attributes of Borrower required to be included on the individual income tax filings or returns of a Shareholder.

"Term" means the period commencing on the Effective Date and terminating on the Maturity Date.

## **2.0 Credit Facility.**

**2.1 Extension of Line of Credit.** Lender makes available to Borrower a line of credit (the "Line"). Subject to the terms of this Agreement, Lender will make Loans to Borrower during the Term in an aggregate principal amount (which for purposes of this

Section 2.1 shall include all amounts drawn or available for draw under any Letter of Credit issued under this Agreement) not to exceed at any time the Maximum Balance (as such amount may be reduced under Section 2.2). The Borrower may borrow, repay, and re-borrow under the Line, without premium or penalty.

2.1.1 The Line may be drawn by Borrower for any Permitted Purpose in the ordinary course of Borrower's business. Unless otherwise required by Lender, all draws upon the Line shall be funded as reasonably directed by Borrower.

2.1.2 In addition to the Permitted Purposes, Borrower may draw upon the Line in the initial draw, (a) for the payment of the Existing Debt of Borrower and (b) for the making of a distribution by Borrower to one or more Shareholders if the proceeds of the distribution are used solely for the payment in full of the Existing Debt of such Shareholder.

2.1.3 If at any time the total principal balance of the Loans outstanding together with amounts drawn or available for draw under issued Letters of Credit exceeds the Maximum Balance, Borrower will immediately pay to Lender an amount sufficient to reduce the amount outstanding to the Maximum Balance.

2.1.4 Borrower will pay all accrued and unpaid interest, in arrears, on the Loans at the Interest Rate on the second calendar day of each calendar month. Borrower will pay the entire principal balance of Loans then outstanding, together with accrued and unpaid interest, and together with any other amounts due from Borrower under the Loan Documents, on the Maturity Date.

2.2 Reduction of Maximum Balance. The Maximum Balance shall be reduced (a) by the Parcel Reduction Amount upon the sale, transfer or other disposition of the parcels or Lots, each as identified on Schedule 2.2, and (b) in the sole discretion of Lender, by the amount of condemnation awards or proceeds or insurance proceeds retained by Borrower, if any.

2.3 Loan Requests and Funding.

2.3.1 Subject to the provisions of Section 2.4 relating to Letters of Credit, Borrower may request Loans by delivering Lender a written loan request in the form attached to this Agreement as Exhibit A together with such additional documents or instruments as may be required under this Agreement (each a "Loan Request"). The Loan Request shall be delivered (a) by facsimile or (b) by electronic mail addressed to Lender's designated representative. The Loan request shall state a date for requested funding which shall not be earlier than the next Business Day. A Loan request received by the Lender after 11:00 a.m. Mountain time on any Business Day shall be deemed received for all purposes on the next Business Day.

2.3.2 Loan Requests may be made by Borrower representatives designated by Borrower and reasonably acceptable to Lender. The initial Borrower representatives are identified on Schedule 2.3.2. Lender may request, in its sole discretion, confirmation of the Loan Request by Borrower by any reasonable method selected by Lender.

2.3.3 Lender will fund a Loan Request on or before 2:00 p.m. Mountain time on the later of (a) the date requested by Borrower, or (b) the first Business Day following the later of (i) the date upon which the Loan Request is received or deemed received or (ii) the date upon which the confirmation of the Loan Request, if requested by the Lender, is received by the Lender.

2.3.4 Subject to the terms and conditions of this Agreement, Lender shall deliver funds in the amount of the Loan Request on the date, and at or prior to the time, required under this Agreement.

2.4 Letters of Credit. Borrower may request that Lender issue one or more Letters of Credit relating to the development of the Real Property by Borrower and on draw and other terms acceptable to Lender in its sole discretion. Issuance of Letters of Credit are subject to the terms and conditions of the Loan Documents relating to Loans generally, including, without limitation, the Maximum Balance and conditions precedent to Lender's obligations to fund Loans under Section 3.0. Borrower will provide Lender a written request for issuance of a Letter of Credit not later than ten (10) Business Days prior to the day upon which Borrower desires the Letter of Credit to be issued. The request shall (a) state (i) the intended beneficiary, (ii) the face amount, (iii) the purposes and (iv) the terms and conditions for draws upon, the Letter of Credit, and (b) include a copy of the form of letter of credit, if any, requested by the intended beneficiary, and (c) include a copy of any contract or other agreement to which the requested Letter of Credit relates. Borrower shall also provide such additional information with respect to a Letter of Credit request as Lender requires. All issued Letters of Credit shall state a date of termination of Lender's obligations which is not later than the Maturity Date. Draws made by a beneficiary under a Letter of Credit shall be considered outstanding Loans, be evidenced by the Note and bear interest thereunder, and shall be secured by the Mortgage. Unless otherwise agreed by Lender, Letters of Credit shall be governed by Montana law, including the Uniform Commercial Code as adopted in the state of Montana. As a condition to issuance of a Letter of Credit, Borrower shall reimburse Lender for all costs and expenses, including fees and expenses of Lender's counsel, incurred by Lender in the issuance of the Letter of Credit. A separate Letter of Credit origination or loan fee shall not be charged by Lender.

2.5 Interest. The Borrower shall pay interest on the daily balance of the principal amount of the Loans outstanding at a rate per annum equal to the Prime Rate plus 50 basis points (0.50%) (the "Interest Rate"). The Interest Rate shall be adjusted as of 12:01 a.m. on each Business Day upon which the Prime Rate changes. Interest shall be calculated on the basis of a year of 360 days and for the actual number of days elapsed. Any principal amount or accrued interest not paid when due, whether at stated

maturity, by acceleration, or otherwise, shall bear interest from the date when due until paid in full at the Default Interest Rate.

2.6 Loan Fee. Upon execution of this Agreement, Borrower shall pay the Loan Fee.

2.7 Note. All Loans made by the Lender under this Agreement shall be evidenced by, and repaid with interest in accordance with, a promissory note of the Borrower in substantially the form of Exhibit B, duly completed, dated the Effective Date, payable to the Lender, and maturing as to principal on the Maturity Date (the "Note"). Borrower authorizes the Lender to enter, on its books and records, the amount of each Loan and of each payment of principal received on account of the Loans, which entries shall, in the absence of manifest error, be conclusive as to the outstanding balance of the Loans made by the Lender; provided, however, that the failure to make such entry with respect to any Loan or payment shall not limit or otherwise affect the obligations of the Borrower under the Loan Documents including under the Note.

2.8 Prepayments. The Borrower may prepay the Loans in whole or in part at any time and without penalty.

2.9 Method of Payment. The Borrower shall make each payment required under the Loan Documents including under the Note, to the Lender not later than 11:00 a.m. Mountain time on the date when due in lawful money of the United States in immediately available funds to the Lender and at the Lender's office in Bozeman, Montana. Whenever any payment to be made under this Agreement or under the Note shall be stated to be due on a day other than a Business Day, such payment shall be made on the next succeeding Business Day, and the extension of time shall in such case be included in the computation of the payment of interest. Payments received by the Lender after 11:00 a.m. Mountain time on a Business Day shall be considered received on the next Business Day for all purposes.

2.10 Application of Payments. Unless otherwise expressly provided in the Loan Documents, and unless an Event of Default has occurred and is continuing, all payments, including prepayments, will be applied first to interest then due, if any, and then to principal. If an Event of Default has occurred and is continuing, all payments will be applied first to amounts due under the Loan Documents other than principal or interest, second to accrued and unpaid interest, whether then due or otherwise, and the remainder to principal. Notwithstanding the foregoing, payments required to reduce the outstanding Loans to not exceed the Maximum Balance shall be applied first to principal to the extent necessary to reduce the outstanding Loans to the Maximum Balance and the remainder, thereafter, in accordance with the preceding sentences of this Section 2.10.

2.11 Late Payment Fees and Charges. In addition to the Default Interest Rate and any other amounts due Lender, and not in limitation of any other right or remedy of Lender, if Borrower fails to make any payment on or before the 10<sup>th</sup> calendar day following the date such payment was due under the Loan Documents (a "Late

Payment"), Borrower will pay to Lender five percent (5.0%) of the amount of the Late Payment (the "Late Payment Charge").

**3.0 Conditions Precedent.**

**3.1 Condition Precedent to Initial Loan.** The obligation of the Lender to make an initial Loan to the Borrower is subject to the condition precedent that the Lender shall have received on or before the day of such initial Loan each of the following, in form and substance satisfactory to the Lender and its counsel:

**3.1.1** The Note and each of the Loan Documents duly executed and delivered by the Borrower and each other party thereto.

**3.1.2** Documents and instruments granting to Lender a mortgage lien upon, security interests in, or assigning or pledging to Lender, the Collateral as security for the Loan, including, without limitation, financing statements duly filed under the Uniform Commercial Code of all jurisdictions necessary or, in the judgment of the Lender, desirable, to perfect the Liens granted to Lender.

**3.1.3** Payment of the Loan Fee together with reimbursement to Lender of all costs and expenses incurred in the negotiation, preparation, entry and perfection of the Loan Documents, including, without limitations, fees and expenses of Lender's legal counsel and filing, recording, registration or similar fees.

**3.1.4** Payment of the Existing Debt, in full, by Borrower or such other person obligated on the Existing Debt.

**3.1.5** Receipt by Lender of an Appraisal of the Real Property by Appraiser and stating an aggregate value in an amount reasonably acceptable to Lender.

**3.1.6** An opinion of Borrower's legal counsel in form and substance satisfactory to Lender.

**3.1.7** Delivery by Borrower of (a) its Articles of Incorporation and Bylaws as in effect on the Effective Date and certified to be true and correct copies by the President of Borrower (the "Borrower Organizational Documents") and (b) a list identifying each Shareholder as of the Effective Date, together with the number, series and class of shares owned by such Shareholder, and (c) a Certificate of Existence for Borrower issued by the Idaho Secretary of State as of a recent date and (d) a resolution or other evidence acceptable to Lender of the Borrower board of director approval and authorization of the Loan Documents.

**3.1.8** Delivery by Borrower of a complete copy of (a) each of the Intercompany Agreements, certified by an officer of Borrower to be true, correct and complete copies of each of the Intercompany Agreements, as the



same are in effect on the Effective Date and (b) the Material Agreements in effect on the Effective Date.

3.1.9 Delivery by Borrower of a certificate of the chief executive officer of Borrower to the effect that (a) each of the Intercompany Agreements is in effect and no default has occurred under or with respect to the Intercompany Agreement and (b) each of the Entitlements is in full force and effect as of the Effective Date.

3.1.10 Delivery by the Borrower of a Construction Budget in form and substance satisfactory to Lender.

3.1.11 Receipt by Lender of a title policy or policies insuring the interests of Lender in the Real Property under the Mortgage, subject only to the Permitted Encumbrances, and on terms and conditions otherwise satisfactory to Lender, and in the amount of the Commitment.

3.1.12 Evidence of the policies of insurance required to be maintained by Borrower under the Loan Documents.

3.1.13 Evidence satisfactory to Lender of the payment in full and termination of the Chesrown Debt, whether by conversion to equity investment in Borrower or otherwise.

3.1.14 Evidence satisfactory to Lender of the payment in full and termination of the Samuel Debt contemporaneously with the payment of the Existing Debt.

3.1.15 Evidence satisfactory to Lender that, after giving effect to the initial disbursement of the Loan and the payment of the Existing Debt, the Chesrown Debt and the Samuel Debt, Borrower will be in compliance with the covenants expressed in Section 6.13.

3.1.16 Such other documents and instruments as Lender may reasonably request.

3.2 Conditions Precedent to All Loans. The obligation of the Lender to make each Loan (including the initial Loan) shall be subject to the further conditions precedent that on the date of each Loan:

3.2.1 No Event of Default has occurred and is then continuing (without regard to the cure period, if any, that is accorded to Borrower), and no event has occurred which, with the passage of time, would constitute an Event of Default, under the Loan Documents.

3.2.2 No material adverse change has occurred in the financial or other condition of Borrower or of the Collateral.

3.2.3 Each of the conditions to Lender's obligations to make the requested Loan shall have occurred, been delivered or are otherwise satisfied at the time of funding of the Loan.

3.2.4 The representations and warranties of Borrower contained in the Loan Documents are true and correct on and as of the date of such Loan as though made on and as of such date.

3.2.5 The Lender shall have received such other approvals, opinions, or documents as the Lender may reasonably request including, documents or instruments evidencing or perfecting the Liens granted under the Mortgage.

#### 4.0 Release of Lots.

4.1 Release. Lender is not obligated to release a Lot, or all or any portion of the Real Property, from the lien of the Mortgage or other security interests or other interests of Lender, unless prior to the effectiveness of such release, the following conditions will have each occurred to the reasonable satisfaction of Lender and at Borrower's sole cost and expense:

4.1.1 The Lot to be released (the "Released Lot") has been subdivided in accordance with all local, state or federal statutes, ordinances or regulations then in effect and in accordance with the Plans.

4.1.2 The release of the Released Lot is necessary for the sale, use or other disposition of the Released Lot and Borrower has delivered to Lender a request for release not later than five (5) Business Days prior to the proposed effective date of the release.

4.1.3 Borrower has, or will substantially simultaneously with the release by Lender, transfer all of Borrower's right, title and interest in and to the Released Lot in an arm's length transaction to a third party that is not an Affiliate.

4.1.4 Borrower is not then in default under the Loan Documents and no event has occurred that, with the passage of time, would constitute an Event of Default.

4.1.5 The sale or other disposition of the Released Lot does not materially impair the usefulness or value of the remaining Real Property or the ability of Borrower to (a) sell, transfer or otherwise dispose of or use any other portion of the Real Property remaining subject to the Mortgage or (b) complete the development of the Project in accordance with the Plans.

4.1.6 Borrower will have delivered to Lender documents and instruments relating to the proposed sale of the Released Lot and such additional documents and instruments and information as Lender may reasonably request with respect to the requested release.

4.1.7 Borrower or an Affiliate are not providing financing for the sale of the Lot or selling the Released Lot under an installment contract, contract for deed or similar instrument deferring, in any amount, the payment by the purchaser of the purchase price or other consideration for the Released Lot.

4.2 Sale or Other Disposition. Except as provided in this Section 4.0 Borrower will not sell, transfer, lease, assign or otherwise dispose of any right, title or interest in or to the Real Property.

5.0 Representations and Warranties. The Borrower represents and warrants to the Lender as of the Effective Date and as of each date on which any Loan Document remains in effect that:

5.1 Existence and Validity. Borrower is an Idaho corporation duly organized and validly existing under the laws of the State of Idaho and has all requisite power, authority and legal right to carry on the business now being conducted by it and to engage in the transactions contemplated by the Loan Documents. The execution and delivery of the Loan Documents and the performance of each of the terms, conditions and covenants of the Loan Documents have been duly authorized by all necessary actions on the part of Borrower. The Loan Documents are in all respects legal, valid and enforceable in accordance with their terms.

5.2 Legally Enforceable Agreement. This Agreement is, and each of the other Loan Documents when delivered under this Agreement will be, legal, valid, and binding obligations of the Borrower, enforceable against the Borrower in accordance with their respective terms, except to the extent that such enforcement may be limited by applicable bankruptcy, insolvency, and other similar laws affecting creditors' rights generally.

5.3 Other Agreements. Borrower is not a party to any indenture, loan, or credit agreement, or to any lease or other agreement or instrument, or subject to any restriction which could have a material adverse effect on the business, properties, assets, operations, or conditions, financial or otherwise, of the Borrower, or the ability of the Borrower to carry out and perform its obligations under the Loan Documents. The Borrower is not in default in any material respect in the performance, observance, or fulfillment of any of the obligations, covenants, or conditions contained in any agreement or instrument material to its business or to which it is a party or by which the Real Property is bound or affected, including, without limitation, the Intercompany Agreements. The execution, delivery and performance by the Borrower of the Loan Documents do not require approval of any governmental authority and will not violate any provision of law or regulation, or any order of any court or other governmental authority to which the Borrower or its assets or properties may be subject, nor result in the breach of, or constitute a default of, any lien, encumbrance, or other agreement or instrument to which the Borrower is a party, or by which the Borrower or the Collateral may be bound or affected.

5.4 Compliance With Laws and Entitlements. The Plans, and the construction of the Project in accordance with the Plans are, and will be upon completion of construction of the Project, in material compliance with all governmental laws and regulations and requirements, standards and regulations of appropriate supervising boards and agencies and all covenants, conditions, restrictions or other private agreements to which the Real Property is, or upon completion of construction of the Project will be, subject to including, without limitation, the Entitlements.

5.5 Litigation. There is no pending or threatened action or proceeding against or affecting the Borrower, the Entitlements or the Collateral before any court, governmental agency, or arbitrator.

5.6 No Defaults on Outstanding Judgments or Orders. The Borrower has satisfied all judgments and the Borrower is not in default with respect to any judgment, writ, injunction, decree, rule, or regulation of any court, arbitrator, or federal, state, municipal, or other governmental authority, commission, board, bureau, agency or instrumentality, domestic or foreign.

5.7 Material Contracts. There have been no material modifications or amendments to the Material Contracts from the form of such Material Contracts provided by Borrower to Lender. Borrower further represents and warrants that each of the Material Contracts delivered to Lender is in full force and effect as of the later of the Effective Date or the date of delivery to Lender, and no event has occurred that, but for the passage of time, would constitute a default in the Material Contracts.

5.8 Availability of Utilities. Except for improvements to be constructed or installed by Borrower, all public utility services necessary for the construction of the Project and the intended development of the Real Property as contemplated by the Plans are available at the boundaries of the Real Property, including water supply, storm and sanitary sewer facilities, natural gas, electric and telephone facilities and shall continue to be available in sufficient quantities when and as needed to serve the construction of the Project.

5.9 Taxes. Borrower has filed all tax returns (federal, state, and local) required to be filed and has paid all taxes, assessments, and governmental charges and levies thereon to be due, including interest and penalties.

5.10 Accuracy of Financial Statements. The financial statements, summaries, representations, and other financial information of Borrower submitted to the Lender, whether prior to the Effective Date or thereafter, (a) were prepared in accordance with generally accepted accounting principles, consistently applied, (b) disclose all liabilities, direct and contingent, as of their respective dates, and (c) fairly and accurately present the financial condition of the Borrower, as of their respective dates, in all material respects. No material adverse change in the financial condition of the Borrower has occurred from the last presentation of Borrower's financial statements to Lender.

5.11 No Violation of Law. There exists no violation of any Law with respect to the current or intended business operations of the Borrower, or the Collateral, which violation would have a material adverse effect on the business of the Borrower, the Collateral or the transactions contemplated by the Loan Documents, and there are no facts presently existing which, with the giving of notice or the passage of time or both, may form the basis of any such violation.

5.12 Title to Collateral. The Borrower has good and marketable title to all of the Collateral, free and clear of all liens and encumbrances, except liens in favor of the Lender and the Permitted Encumbrances. Borrower has not executed any security agreements or financing statements with respect to, or otherwise mortgaged or granted any consensual lien with respect to, any of its respective properties or assets, including, without limitation, in or to any portion of the Collateral, except for the Intercompany Agreements.

5.13 Condition of Real Property. The Real Property is not now damaged or injured as a result of any fire, explosion, accident, flood, or other casualty or act of God, and are not now the subject of any pending or threatened condemnation proceedings.

5.14 Priority of Lien on Collateral. The Loan Documents grant to Lender a direct, valid and enforceable first priority lien on the Collateral.

5.15 Continuing Nature. All warranties and representations by the Borrower and guarantors herein and in the other Loan Documents are now and will continue to be true and correct until the Loans and all interest thereon and all other obligations of Borrower under the Loan Documents are paid in full and all covenants and agreements are observed and performed by the Borrower. By submitting a Loan Request or issuance of a Letter of Credit, Borrower confirms to Lender that the representations and warranties of Borrower are materially true and correct on and as of the date of such request.

6.0 Covenants. So long as the Note shall remain unpaid or the Lender shall have any obligation under this Agreement, the Borrower will perform each of the covenants stated in this Section 6.0. By requesting a Loan or issuance of a Letter of Credit, Borrower confirms to Lender that Borrower has performed each of the covenants on and prior to the date of such request.

6.1 Restriction on Certain Actions. Borrower will not:

6.1.1 Issue any shares of voting or nonvoting stock of Borrower to any person or permit the transfer of any shares of any voting or nonvoting stock of Borrower by or to any Person.

6.1.2 Make any payment or distribution to Shareholders in property or in cash at any time except for (a) Tax Distributions or (b) distributions made for the payment of Existing Debt in accordance with this Agreement.

6.1.3 (a) Following the occurrence of an Event of Default, make any payment on or with respect to the BRN Note or the Intercompany Agreements or (b) pay any amount on or with respect to the BRN Note or the Intercompany Agreements prior to the time at which payment is actually due.

6.1.4 Cause, enter or consent to the amendment, modification, or termination of the Borrower Organizational Documents or the Intercompany Agreements.

6.1.5 Sell or agree to sell or otherwise transfer any interest in or to the Collateral except for the sale of Released Lots in accordance with Section 4.0.

6.1.6 Make any loans or advances to, or guarantee, endorse, or become a surety or otherwise become liable, directly or contingently, upon the obligation of any Person.

6.1.7 Dissolve or liquidate, or sell, assign, lease or transfer all or any material part of its assets or business, or enter into any merger, consolidation, pool, joint venture, or other combination or engage in or conduct any business activity other than such activities as are conducted by Borrower as of the Effective Date.

6.1.8 Make any investment in, or acquire any debt or equity interests in, or acquire all or substantially all of the assets of, any Person.

6.1.9 Incur or assume any debt except for (a) debt under the Intercompany Agreements which is subordinate to the obligations of Borrower to Lender or (b) accounts payable incurred in the ordinary course of business, which are unsecured, and which state an initial maturity of not greater than ninety (90) days of incurrence by Borrower.

6.1.10 Create, incur, assume, or suffer to exist, any pledge, lien, security interest, assignment, deposit arrangement, or other preferential arrangement, charge, or encumbrance (including, without limitation, any conditional sale, or other title retention agreement, or finance lease) of any nature, upon or with respect to the Collateral, or any asset now owned or hereafter acquired other than Liens in favor of the Lender.

6.1.11 Except for the Black Rock Management Contract, enter any agreement for the management, leasing or operation of the Real Property.

6.2 Title to Assets and Maintenance. Borrower will defend and maintain title to all of its material properties and assets, including, without limitation, in and to the Collateral. Borrower will keep its assets, both real and personal, including, without limitation, the Collateral, in good order and condition consistent with industry practice and will make all necessary repairs, replacements and improvements sufficient to maintain the value of the Collateral commensurate with industry practices.

6.3 Payment of Liabilities. Borrower will pay all its liabilities as they become due unless they are contested in good faith by appropriate actions or legal proceedings and Borrower establishes adequate reserves in accordance with generally accepted accounting principles. Borrower will (a) keep accurate and complete records of all accounts; and (b) make no material change in any of the terms of any account or grant to any account debtor any rebate, refund, allowance, or credit upon any account nor adjust, settle or compromise the amount or payment of any account.

6.4 Inspection of Collateral. Borrower will allow Lender and any person or entity designated by the Lender, to inspect, at any reasonable time, Borrower's business premises and any or all of the Collateral and the Borrower's operations with respect to the Collateral.

6.5 Setoff. Borrower grants to the Lender a contractual possessory security interest in, and hereby assigns, conveys, delivers, pledges, and transfers to the Lender all the Borrower's right, title and interest in and to, the Borrower's deposit accounts with Lender and that upon the occurrence and during the continuance of any Event of Default the Lender is hereby authorized at any time and from time to time, without notice to the Borrower (any such notice being expressly waived by the Borrower), to set off and apply any and all deposits (whether general or special, time or demand, provisional or final) held against the indebtedness at any time owing to the Lender. The foregoing rights of the Lender are in addition to other rights and remedies (including, without limitation, other rights of setoff) which the Lender may have.

6.6 Maintain Entitlements. Borrower will not cause or permit, by any act or failure to act, any Entitlement, to expire without filing a timely application for renewal or to be surrendered or modified, or take any action that would cause any governmental or other authority to institute proceedings for the suspension, revocation, or adverse modification of any such Entitlement.

6.7 Further Assurances. Borrower will execute and deliver such other and further instruments and to perform such other and further acts as in the opinion of the Lender may be necessary or desirable to carry out more effectively the purposes of this Loan Agreement or to create or perfect the Liens of Lender in the Collateral.

6.8 Perform Covenants. The Borrower will perform all of its duties, covenants and obligations under, and make all payments and take all other action required by, the Loan Documents.

6.9 Insurance. Borrower will obtain and keep in full effect such insurance or evidence of insurance as Lender may reasonably require including, but not limited to, the insurance required on Schedule 6.9. All such insurance policies will contain such reasonable endorsements as Lender may from time to time require, and all liability policies will name Lender as additional insureds or additional loss payees as their interests may appear. All such insurance policies will be endorsed with a loss payable clause in favor of Lender. Borrower will give Lender satisfactory evidence of renewal of all such policies with premiums paid at least thirty (30) days before expiration of

such policy or policies. Borrower agrees to pay all premiums on such insurance as they become due, and will not permit any condition to exist on or with respect to the Collateral which would wholly or partially invalidate any insurance. Borrower will give immediate written notice to the insurance carrier and to the Lender of any loss. Borrower hereby authorizes and empowers Lender, at Lender's option and in Lender's sole discretion, and following an Event of Default, to act as attorney-in-fact for Borrower to make proof of loss, to adjust and compromise any claim under insurance policies, to collect and receive insurance proceeds and to deduct therefrom expenses incurred in the collection of such proceeds, and all insurance policies of Borrower will provide that Lender may act as Borrower's attorney-in-fact for such purposes. Borrower will provide copies of all insurance policies to Lender when and as Lender may request. Upon demand of Lender, Borrower shall deliver to Lender for application to the obligations of Borrower to Lender, all insurance proceeds received or receivable by Borrower.

6.10 Compliance With Laws. Borrower will comply in all respects with all applicable Laws, such compliance to include, without limitation, paying before the same become delinquent all taxes, assessments, or governmental charges imposed upon Borrower or upon its property, including the Real Property.

6.11 Right of Inspection. The Lender will be allowed, at the Borrower's sole cost and expense, by any person or entity designated by the Lender, to (i) inspect, at any reasonable time, all of the Borrower's books, records, accounting systems and accounts, (ii) inspect the Borrower's records to audit the statements provided or required to be provided by Borrower, and (iii) to discuss the contents of such books of record and accounts with appropriate employees, agents, officers, managers, members or directors of the Borrower and (iv) make and keep copies of such books and records and other information of Borrower as Lender may deem appropriate.

6.12 Reporting Requirements. Borrower shall furnish to the Lender:

6.12.1 Monthly Financial Statements. As soon as available, and in any event on or before the 20<sup>th</sup> calendar day following the last day of each calendar month, Borrower financial statements including, without limitation, balance sheets, statements of income and statements of changes in financial position of the Borrower and any subsidiary, all in reasonable detail and all prepared in accordance with GAAP consistently applied.

6.12.2 Annual Financial Statements. As soon as available, and in any event on or before the 60<sup>th</sup> day following the last day of Borrower's fiscal year, Borrower financial statements including, without limitation, balance sheets, statements of income and statements of changes in financial position of the Borrower and any subsidiary, all in reasonable detail and all prepared in accordance with GAAP consistently applied.



6.12.3 Tax Returns. When and as filed, complete copies of state and federal income tax and information returns, together with any amendments, filed by Borrower.

6.12.4 Guarantor Information. As soon as available, and in any event (a) on or before April 15<sup>th</sup> of each calendar year, a personal financial statement of the Guarantor, in reasonable detail and (b) when and as filed, the federal income tax return of Guarantor.

6.12.5 Notice of Litigation. Promptly after the commencement thereof, notice of all actions, suits, and proceedings before any court or governmental department, commission, board, bureau, agency, or instrumentality, domestic or foreign, affecting the Borrower, which, if determined adversely to the Borrower, could have a material adverse effect on the financial condition, properties, or operations of the Borrower.

6.12.6 Notice of Events of Default. Upon the occurrence of an Event of Default (without regard to the cure period, if any, accorded Borrower), a written notice setting forth the details of such Event of Default and the action which is proposed to be taken by the Borrower.

6.12.7 Notification of Liens. Borrower will immediately advise Lender in writing of any written notice from any laborer, supplier, subcontractor, vendor or materialman to the effect that such laborer, supplier, subcontractor, vendor or materialman has not been paid when due for any labor or materials furnished in connection with the construction of the Project, whether Borrower shall have received written notice of an intention to file a lien or otherwise.

6.13 Certain Financial Covenants. Borrower will conduct its business so as to maintain the following financial covenants, each as determined in accordance with GAAP:

6.13.1 Borrower will maintain a Tangible Net Worth of not less than \$4,500,000, measured as of the last day of each calendar month. "Tangible Net Worth" means the excess of total book value of Borrower assets over the sum of (a) total Borrower liabilities plus (b) total Borrower intangible assets.

6.13.2 Borrower will maintain a ratio of Total Debt to Adjusted Net Worth of not greater than 2.00:1.00, measured as of the last day of each calendar month. "Total Debt" means all indebtedness of Borrower, including, without limitation, indebtedness under the BRN Note. "Adjusted Net Worth" means the total book value of Borrower assets less the book value of receivables due from Affiliates.

6.14 Material Contracts. Upon request of Lender, Borrower will provide Lender true, correct and complete copies of all Material Contracts then in effect.

6.15 Entitlements. On request of Lender, Borrower will provide Lender (a) updated lists of Entitlements held and further Entitlements required for completion of the Project in accordance with the Plans and (b) copies of all Entitlements and (c) a confirming letter of the Borrower or Borrower's counsel, as Lender may request, to the effect that, after due inquiry, the Entitlements not yet obtained but required for completion of the Project are obtainable by Borrower in the ordinary course.

6.16 Use of Loan Proceeds. Borrower will use the proceeds of the Loan solely for Permitted Purposes.

6.17 Completion of Construction. Borrower will, and will cause all parties with which Borrower contracts to, diligently pursue construction of the Project to completion and will supply such monies and perform such duties as may be necessary to complete the construction in accordance with the Plans and in full compliance with all terms, conditions and covenants of the Loan Documents. All of such construction shall be completed without liens, claims or assessments (actual or contingent) asserted against the Collateral for any material, labor or other items furnished in connection with such construction, excluding only such liens, claims or assessments as are assured or bonded to Lender's satisfaction. Borrower shall cause the construction to be completed in full compliance with all Entitlements and all construction, use, building, zoning and other similar requirements of any governmental jurisdiction and all covenants, conditions, restrictions or other private agreements to which the Real Property is or may become subject. Borrower shall provide Lender with satisfactory evidence of such compliance, from time to time, upon reasonable request of Lender.

6.18 Final Plats. Borrower shall cause the final plat(s) or similar instruments necessary for the completion of the Project and disposition of Lots, to be recorded with respect to some or all of the Real Property as soon as commercially reasonable and consistent with the Plans. All final plats or similar instruments shall be materially consistent, in all respects, with the Plans and the Entitlements. Borrower will provide Lender the form of any final plat or similar instrument not later than fifteen (15) days prior to the date of intended recording.

#### 7.0 Events of Default and Remedies.

7.1 Events of Default. The occurrence, and, with respect to default other than for nonpayment, the continuance thereof unremedied for thirty (30) days or such longer period as may be specifically provided in the Loan Documents with respect to such occurrence, of any of the followings events will be deemed to constitute an "Event of Default" under this Loan Agreement:

7.1.1 The Borrower fails to pay in full, any payment or other amount required under the Note or any of the other Loan Documents, when and as such payment is due.

7.1.2 The Borrower fails to fully perform and keep any and all covenants and agreements in the Loan Documents required to be performed by

it or the occurrence of any event of default as defined in or provided in any Loan Document.

7.1.3 An event of default or other failure of performance occurs under (a) the Subordination Agreement or (b) the Guaranty or (c) the Entitlements or (d) the Material Contracts, which remains uncured for the period of time, if any, accorded under such instrument or agreement.

7.1.4 The filing or other assertion of any lien or other encumbrance on the Collateral by any Person other than the Lender.

7.1.5 The voluntary or involuntary transfer of any right, title or interest in or to the Collateral except for the sale of Lots as permitted by Section 4.0 of this Agreement.

7.1.6 If the Borrower or Guarantor shall become insolvent (however such insolvency may be evidenced) or bankrupt, or shall file for bankruptcy, or shall make an assignment for the benefit of or a composition with creditors, or shall be unable, or shall admit in writing its or their inability, to pay its or their debts as they mature; or if bankruptcy, reorganization, arrangement, insolvency or similar proceeding for relief of financially distressed debtors shall be instituted against Borrower or Guarantor and shall not be dismissed on appeal, within sixty (60) days of such institution; or if Borrower or Guarantor shall petition for, or there shall be appointed for a substantial part of the assets or properties of the Borrower or Guarantor, a trustee, receiver or liquidator, or if the Borrower or Guarantor shall take any action for the purposes of effecting any of the foregoing.

7.1.7 If any representation or warranty of the Borrower contained in any of the Loan Documents, or if any financial statement or other document provided to the Lender by Borrower in connection with the Loan or required under the Loan Documents proves to have been false in any material respect when made or furnished.

7.1.8 If the Borrower is in default in payment or performance under any agreement to which Borrower is a party or by which the property of Borrower is bound or affected, including, without limitation, under the Intercompany Agreements.

7.1.9 The entry of one or more judgments against Borrower.

7.1.10 A Change in Control occurs.

7.1.11 Death of Guarantor.

7.2 Remedies. Upon the occurrence of any Event of Default, the Lender shall be entitled to exercise, in addition to any right or remedy accorded at law or in equity, the following remedies and all such remedies are deemed to be cumulative and may be

exercised individually or in combination as appropriate: (i) to declare all amounts owing under the Loan Documents including under the Note to be immediately due and payable in full; (ii) to pursue all rights and remedies provided for in the Loan Documents; (iii) to have a receiver appointed by a court of competent jurisdiction, in order to manage, protect, and preserve the Borrower's business and all other Collateral and to continue the operation of the Borrower's business (including the collection of all revenues and payment of all expenses of the receivership) until sale or other final disposition of the Collateral and (iv) to foreclose the Mortgage and to exercise any remedy accorded a secured party under the Uniform Commercial Code or similar law. The exercise of any one or more rights or remedies shall not be deemed a waiver of any other rights or remedies.

7.3 Lender's Curative Rights. Upon the happening of any Event of Default which may be cured by payment of money or by performance of any act, the Lender, without waiving any right or remedy, shall have the right, but not the obligation, to make such payment or perform such act, and to add to the amount owing to Lender, and to demand and receive from Borrower, the amount of such payment or the cost of performing such action. All such amounts shall bear interest, until paid, at the Default Interest Rate.

#### 8.0 General Provisions.

8.1 Amendments; Consents. No amendment, modification, supplement, extension, termination or waiver of any provision of this Agreement or any other Loan Document, no approval or consent thereunder, and no consent to any departure by the Borrower or any other party therefrom, may in any event be effective unless in writing signed by the Lender, and then only in the specific instance and for the specific purpose given.

8.2 Notices. All notices, requests and demands hereunder will be in writing and (i) made to the address set forth below, or to such other address as either party may designate by written notice to the other in accordance with this provision, and (ii) deemed to have been given or made: if delivered in person, immediately upon delivery; if by telex, or telegram, immediately upon sending and upon confirmation of receipt; if by nationally recognized overnight courier service with instructions to deliver the next Business Day, one (1) Business Day after sending; and if by certified mail, return receipt requested, five (5) days after mailing.

If to Borrower: BRN Development, Inc.  
Attn: Marshall R. Chesrown  
912 Northwest Blvd.  
Coeur d'Alene, ID 83814

If to Lender: American Bank  
1612 W. Main Street  
Bozeman, MT 59715  
Attn: Mark Hendrickson

8.3 Actions. The Lender shall have the right to commence, appear in, or defend any action or proceedings purporting to affect the rights, duties or liabilities of the parties as set forth in the Loan Documents. In such event, the Borrower agrees to pay the Lender on demand all expenses, including reasonable attorneys' fees, incurred in connection with such action.

8.4 Assignment. This Agreement and the rights or obligations of Borrower may not be assigned by the Borrower without the Lender's prior written consent, which consent the Lender may grant or withhold in its sole discretion. Without in any way lessening the effect of the preceding sentence, the duties and obligations provided in the Loan Documents shall be binding upon and inure to the benefit of the successors and assigns of the parties. The Borrower acknowledges that the Lender may transfer all or a portion of the Loan to one or more third parties and the Borrower consents thereto and agrees to render performance to the assignees and the Lender as appropriate.

8.5 Governing Law. This Agreement is being executed in the State of Montana and is to be governed by and construed in accordance with the laws of Montana.

8.6 Costs, Expenses and Taxes. Borrower shall pay on demand the costs and expenses of the Lender in connection with the negotiation, preparation, execution and delivery of the Loan Documents, and in connection with the amendment, waiver, refinancing, restructuring, reorganization (including a bankruptcy reorganization) and enforcement or attempted enforcement of the Loan Documents, and any matter related thereto, including, without limitation, filing fees, recording fees, title insurance fees, appraisal fees, search fees and other out-of-pocket expenses and the reasonable fees and out-of-pocket expenses of any legal counsel, independent public accountants and other outside experts retained by the Lender. Borrower shall pay any and all documentary and other taxes (other than income or gross receipts taxes generally applicable to Lender) and all costs, expenses, fees and charges payable or determined to be payable in connection with the filing or recording of this Agreement, any other Loan Document or any other instrument or writing to be delivered hereunder or thereunder, or in connection with any transaction pursuant hereto or thereto, and shall reimburse, hold harmless and indemnify the Lender from and against any and all loss, liability or legal or other expense with respect to or resulting from any delay in paying or failure to pay any tax, cost, expense, fee or charge or that any of them may suffer or incur by reason of the failure of any party to perform any of its obligations. Any amount payable to the Lender under this Section shall bear interest from the second Business Day following the date of demand for payment at the Default Interest Rate.

8.7 Severability/Titles. In case any one or more of the provisions of any of the Loan Documents shall be held to be invalid, illegal or unenforceable in any respect

by any court or other entity having the authority to do so, the validity of the remaining provisions shall in no way be affected, prejudiced or disturbed. Titles and headings herein are for reference purposes only and do not constitute a part of this Agreement.

8.8 Counterparts. This Agreement may be executed in any number of counterparts, each of which shall be an original, but all of which together shall constitute one agreement.

8.9 Time. Time is of the essence of this Agreement.

8.10 Attorneys' Fees. The prevailing party in any legal proceeding for the interpretation or enforcement of this Agreement or the Loan Documents will be entitled to recover its cost and expenses, including reasonable attorneys' fees, incurred in or with respect to such proceeding.

8.11 Further Assurance. Each party to this Agreement shall execute such additional documents and instruments and take such actions as may be reasonably necessary or convenient to effectuate the intent of this Agreement and the Loan Documents.

8.12 Entire Agreement. This Agreement, together with the other Loan Documents, comprises the complete and integrated agreement of the parties with respect to the subject matter and supersedes all prior agreements, written or oral, on the subject matter. Each Loan Document was drafted with the joint participation of the respective parties and shall be construed neither against nor in favor of any party.

*[Remainder of page blank. Signature page follows.]*

IN WITNESS WHEREOF, the parties have caused this Agreement to be executed by their respective officers thereunto duly authorized, as of the date first above written.

LENDER:

AMERICAN BANK

By: Mark S. Hendrickson  
Its: COO

BORROWER:

BRN DEVELOPMENT, INC.

By: [Signature]  
Marshall R. Chesrown, President

**EXHIBIT A**  
**LOAN REQUEST FORM**

REVOLVING CREDIT AGREEMENT

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CONFIDENTIAL

AB002470

2015



**EXHIBIT B**

**NOTE**

**SCHEDULE 1**

**MATERIAL CONTRACTS**

Pool World Swimming Pool Design Fee Proposal  
Nystrom Olson Collins Proposal for Architectural Design Services  
DCI Engineers Professional Services Agreement  
Summit Professional Engineering, LLC  
Energy Control, Inc. Fee Proposal  
Clay Enterprises Contract Proposal  
Nystrom Olson Collins Proposal for Architectural Design Services  
Summit Professional Engineering, LLC Proposal  
Energy Control, Inc. Fee Proposal  
DCI Engineers Professional Services Agreement  
Contract Agreement between BRN and Aapex Construction, Inc.  
Contract Agreement between BRN and Peak Sand and Gravel  
Strata Engineering Revised Proposal  
Agreements between Design Workshop and BRD  
Golf Course Design Agreement

REVOLVING CREDIT AGREEMENT

Page 27

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CONFIDENTIAL

AB002472

2017

# SCHEDULE 2.2

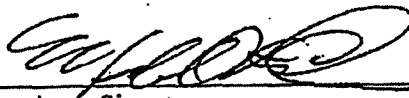
## PARCEL REDUCTION AMOUNTS

Parcel	Number of Units	Release Price per unit	Release Price per acre
A			40,000
B			30,000
C			20,000
I	8	95,051	
II	21	83,283	
III	26	83,896	
IV	64	27,061	
1	24	124,644	
2	22	151,897	
3	4	260,000	
4	12	199,870	
5	11	114,532	
6	32	229,553	
7	4	212,914	
9	17	155,117	
10	17	156,224	
11	11	153,090	
12	17	122,138	
13	10	134,815	
14	4	153,375	
15	5	114,400	
16	16	147,784	
Total	325		

SCHEDULE 2.3.2

BORROWER REPRESENTATIVE

Marshall R. Chesrown

  
\_\_\_\_\_  
Specimen Signature

Chad V. Rountree

  
\_\_\_\_\_  
Specimen Signature

**SCHEDULE 6.9**

**INSURANCE**

Fire and "all risk" insurance covering 100 percent (100%) of the replacement cost of all fixtures, buildings, structures or other improvements on the Real Property or otherwise owned or leased by Borrower in the event of fire, lightening, earthquake, flood, vandalism and other risks normally covered by "all risk" policies.



**Leon Royer**  
President

November 6, 2006

Mr. Dean Paauw  
Cushman & Wakefield of Colorado, Inc.  
1050 17<sup>th</sup> Street, Suite 1400  
Denver, CO 80265

Delivery by email and Federal Express

Dear Dean,

This letter is to confirm your assignment to appraise the property known as Black Rock North. The property encompasses approximately 1001 acres and is located approximately 18 miles southwest of Coeur d'Alene, Idaho. Upon completion, the project will contain 325 lots segmented into 198 single family sites ranging in size from approximately 1 to 11 acres. There will also be 127 multi-family attached residential units in four phases ranging in size from .20 acres to .88 acres per unit. The project will also contain an 18-hole Tom Wieskopf designed course with a 27,500 square foot club house, an 18-hole putting course, maintenance facilities and an equestrian center.

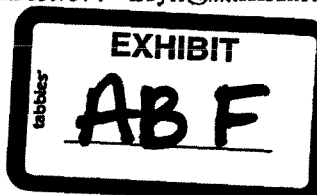
This assignment also includes instructions to appraise the remaining un-sold lots in the existing The Club at Black Rock development. It is my understanding that the number of un-sold lots is approximately 50 lots.

Please appraise the property on a as-is basis and on a as-if completed basis, to include values for each specific lot. The appraisal, among other things, will be used in support of financing to the project. American Bank requests that the report be written, complete, and self-contained in nature.

For additional information, you may contact Roger Nelson, Vice President of Sales, Marketing and Planning for Black Rock North at 208.691.3600 (cell).

---

P.O. Box 1970 • 1632 West Main Street • Bozeman, MT 59771-1970  
406.522.3529 • Fax 406.585.7574 • lroyer@americanbankmontana.com



CONFIDENTIAL

AB002132

Letter to Dean Pauw

2

11/6/2006

Three copies of the appraisal report and your invoice for payment of the appraisal fee of \$25,000 [including all expenses] are to be delivered by Federal Express to Mark Hendrickson, 1632 West Main Street, Bozeman, Montana, 59715. The complete appraisal report is to be provided to Mark no later than December 15, 2006.

The purpose of the appraisal is to provide a supported opinion of the Market Value of the real estate on an as-is basis and on a per lot basis as of the date of your inspection in accordance with the appraisal policies and procedures of American Bank. A copy of this letter and any other written instructions from the Bank must be included in your appraisal report, as well as the specific definition of market value used in the appraisal analysis. Your appraisal is to state your supported opinion of market value and the marketing period.

The appraisal must conform with the prevailing guidelines issued under Title XI of the Federal Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA) and the prevailing standards outlined in the Uniform Standards for Professional Appraisal Practice. Should a disparity exist between the two standards, the standards outlined under FIRREA shall prevail. Should the scope of your work be more limited, the exceptions are to be clearly identified in the cover letter.

Your certification of the appraisal must state that the appraisal assignment was not based on a minimum value, a specific value, or approval of the loan.

Please contact Mark Hendrickson at 406.522.3538 if you have questions regarding these instructions or the assignment.

Best regards,





Tanaya Carter  
Vice President

July 2, 2009

Mr. Dean Paauw, MAI  
Masters Valuation Services  
16 Inverness Place East, #A-200  
Englewood, CO 80112

Electronic mail to: [dean@mastersvaluation.com](mailto:dean@mastersvaluation.com)

Dear Dean:

This letter is to confirm your assignment to perform an appraisal of the property known as Black Rock North. The property encompasses approximately 1001 acres and is located 18 miles southwest of Coeur d'Alene, Idaho. Please see the attached "Exhibit A" for the property legal descriptions. The property and improvements thereon are to be appraised in its "as is" condition. American Bank requests that the report be written, complete and self contained in nature.

For additional information and access, please contact Marshall Chesrown at 208-755-3100 (Cell) or 208-665-2005 (Office)

The appraisal assignment is expected to fully demonstrate and support in appropriate form via the generally accepted approaches to estimating market value (as promulgated by the Uniform Standards of Professional Appraisal Practice, The code of Professional Appraisal Ethics, and the nationally recognized professional appraisal organizations) all of the assumptions you employ in reaching your own final estimate of market value for subject property in its present condition. "Market Value" is defined in the attached exhibit.

The appraisal must also conform with the prevailing guidelines issued under Title XI of the Federal Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA) and the prevailing standards outlined in the Uniform Standards for Professional Appraisal Practice. Should a disparity exist between the two standards, the standards outlined under FIRREA shall prevail.

Three (3) copies of the final appraisal report and your invoice for payment of the appraisal fee shall be addressed and delivered to Bryan Klein, American Bank, 1632 West Main, Bozeman, Montana, 59715. It is my understanding that the cost of the appraisal will not exceed \$11,500.00 and you will provide it to him not later than August 28, 2009. If you have any questions, please call me at 406.522.3542.

Sincerely,

A handwritten signature in black ink, appearing to read "Tanaya Carter", written over a horizontal line.

P.O. Box 1970 • 1632 West Main Street • Bozeman, MT 59771-1970 • 406 / 522-3542 • FAX 406 / 586-4362

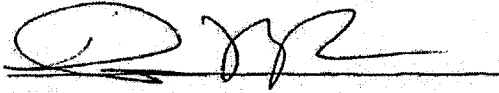
2023

AB004823



Please acknowledge and return with the appraisal report.

I agree to accept the appraisal assignment as outlined above and will to the best of my ability perform to FIRREA and USPAP standards.



Date

7/13/09

### Market Value Definitions

"Market Value" means:

"The most probable price which a property should bring in a competitive and open market under all conditions requisite to a fair sale, the buyer and seller, each acting prudently, knowledgeably, and assuming the price is not affected by undue stimulus."

Implicit in this definition is the consummation of a sale as of a specified date and the passing of title from seller to buyer under conditions whereby:

- Buyer and Seller are typically motivated;
- Both parties are well informed or well advised, and both acting in what they consider their own best interest.
- A reasonable time is allowed for exposure in the open market;
- Payment is made in terms of cash in U.S. dollars or in terms of financial arrangements comparable thereto; and
- The price represents the normal consideration for the property sold unaffected by special or creative financing or sales concessions (including concessions on terms, services, fees, costs, or other credits) granted by anyone associated with the sale.



September 16, 2010

Mr. Dean Panuw, MAI  
Masters Valuation Services  
5889 South Greenwood Plaza Blvd, Suite 404  
Greenwood Village, CO 80111

Electronic mail to: [dean@mastersvaluation.com](mailto:dean@mastersvaluation.com)

Dear Mr. Panuw:

This letter is to confirm your assignment to perform an appraisal of the property known as Black Rock North. The property encompasses approximately 1001 acres and is located 18 miles southwest of Coeur d'Alene, Idaho. Please see the attached "Exhibit A" for the legal description of the property. The property and improvements located thereon are to be appraised in its "as is" condition. American Bank requests the report be written and Complete Summary in nature.

The appraisal report and your invoice for payment of the appraisal fee of \$7,500 are to be addressed to Bryan Klein at American Bank, P O Box 1970, Bozeman, MT 59771. Please email an electronic copy to Bryan at [bklein@americanbankmontana.com](mailto:bklein@americanbankmontana.com). The appraisal report shall be completed no later than October 22, 2010.

The purpose of the appraisal is to provide a supported opinion of the Market Value (definition attached) of the real estate as of the date of your inspection, in accordance with the appraisal policies and procedures of American Bank. A copy of this letter and any other written instructions from the Bank must be included in your appraisal report, as well as the specific definition of market value used in the appraisal analysis. *Your appraisal must state your supported opinion of market value and the marketing period.* Please furnish American Bank with copies of original pictures.

The appraisal must conform with the prevailing guidelines issued under Title XI of the Federal Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA) and the prevailing standards outlined in the Uniform Standards for Professional Appraisal Practice. Should a disparity exist between the two standards, the standards outlined under FIRREA shall prevail.

Should the scope of your work be more limited, the exceptions should be identified in the appraisal cover letter.

Your certification of the appraisal must state that the appraisal assignment was not based on a minimum value, a specific value, or approval of the loan.

Please contact Bryan Klein at (406) 522-3538 to obtain any necessary information concerning the property or to answer any question regarding these instructions or the assignment.

Sincerely,

A handwritten signature in cursive script that reads "Craig M. Hveem".

Craig Hveem  
Executive Vice President

2025

AB005006

### **Market Value Definition**

**"Market Value" means:**

"the most probable price which a property should bring in a competitive and open market under all conditions requisite to a fair sale, the buyer and seller each acting prudently and knowledgeably, and assuming the price is not affected by undue stimulus."

Implicit in this definition is the consummation of a sale as of a specified date and the passing of title from seller to buyer under conditions whereby:

- Buyer and seller are typically motivated;
- Both parties are well informed or well advised, and both acting in what they consider their own best interest;
- A reasonable time is allowed for exposure in the open market;
- Payment is made in terms of cash in U.S. dollars or in terms of financial arrangement comparable thereto; and
- The price represents the normal consideration for the property sold unaffected by special or creative financing or sales concessions (including concessions on terms, services, fees, costs, or other credits) granted by anyone associated with the sale.

**Bryan J. Klein**

---

**From:** Bryan J. Klein  
**Sent:** Thursday, September 13, 2007 7:38 AM  
**To:** 'Marshall Chesrown'  
**Subject:** RE: appraisal  
**Attachments:** image001.jpg

Good Morning Marshall,

I will contact Dean Paauw and instruct him to stop his work on the appraisal report. If his final invoice is less than \$12,500, I'll forward a reimbursement check to Chad Rountree.

Thanks,  
Bryan

---

**From:** Marshall Chesrown [mailto:marshallc@blackrockdevelopment.com]  
**Sent:** Wednesday, September 12, 2007 7:45 PM  
**To:** Bryan J. Klein  
**Cc:** bob@samuelandcompany.com  
**Subject:** appraisal

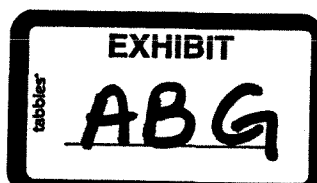
Bryan, I just met with Sam and we would like to request that the appraisal is not published or completed. Please let me know ASAP if that is ok.



Marshall R. Chesrown  
CEO  
**Black Rock Development Inc.**  
P.O. Box 3070  
Coeur d'Alene, Idaho 83816  
208-665-2005 Phone  
208-667-5071 Fax  
208-755-3100 Cell  
www.blackrockdevelopment.com

8/7/2009

CONFIDENTIAL



2027

AB003418

2011 NOV 22 PM 2: 24

CLERK DISTRICT COURT  
*Barb Crumache*  
DEPUTY

NANCY L. ISSERLIS, ISB #7331  
ELIZABETH A. TELLESSEN, ISB #7393  
WINSTON & CASHATT  
250 Northwest Boulevard, Suite 206  
Coeur d'Alene, Idaho 83814  
Telephone: (208) 667-2103  
Facsimile: (208) 765-2121  
[nli@winstoncashatt.com](mailto:nli@winstoncashatt.com) & [eat@winstoncashatt.com](mailto:eat@winstoncashatt.com)

RANDALL A. PETERMAN, ISB #1944  
C. CLAYTON GILL, ISB # 4973  
MOFFATT, THOMAS, BARRETT, ROCK  
& FIELDS, CHARTERED  
101 South Capital Blvd., 10<sup>th</sup> Floor  
P.O. Box 829  
Boise, Idaho 83701  
Telephone: (208) 345-2000  
Facsimile: (208) 385-5384  
[rap@moffatt.com](mailto:rap@moffatt.com) & [ccg@moffatt.com](mailto:ccg@moffatt.com)

Attorneys for Plaintiff

**IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE  
OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI**

AMERICAN BANK, a Montana banking  
corporation,

Plaintiff,

vs.

BRN DEVELOPMENT, INC., an Idaho  
corporation, BRN INVESTMENTS, LLC, an  
Idaho limited liability company, LAKE VIEW  
AG, a Liechtenstein company, BRN-LAKE  
VIEW JOINT VENTURE, an Idaho general  
partnership, ROBERT LEVIN, Trustee for the  
ROLAND M. CASATI FAMILY TRUST, dated  
June 5, 2008, E. RYKER YOUNG, Trustee for  
the E. RYKER YOUNG REVOCABLE TRUST,  
MARSHALL CHESROWN a single man,  
IDAHO ROOFING SPECIALIST, LLC, an Idaho  
limited liability company, THORCO, INC., an

Case No. CV 09-2619

**AMERICAN BANK'S RESPONSE TO ACI  
NORTHWEST, INC.'s MOTION TO STRIKE  
THE AFFIDAVIT OF BRYAN KLEIN**

**ORIGINAL**

AMERICAN BANK'S RESPONSE TO ACI NORTHWEST, INC.'S  
MOTION TO STRIKE THE AFFIDAVIT OF BRYAN KLEIN - 1

*Winston & Cashatt*  
A PROFESSIONAL SERVICE CORPORATION  
250 Northwest Blvd., Suite 206  
Coeur d'Alene, Idaho 83814  
Phone: (208) 667-2103

2628

1 Idaho corporation, CONSOLIDATED SUPPLY  
2 COMPANY, an Oregon corporation,  
3 INTERSTATE CONCRETE & ASPHALT  
4 COMPANY, an Idaho corporation, CONCRETE  
5 FINISHING, INC., an Arizona corporation, THE  
6 TURF CORPORATION, an Idaho corporation,  
7 WADSWORTH GOLF CONSTRUCTION  
8 COMPANY OF THE SOUTHWEST, a Delaware  
9 corporation, POLIN & YOUNG  
10 CONSTRUCTION, INC., an Idaho corporation,  
11 TAYLOR ENGINEERING, INC., a Washington  
12 corporation, PRECISION IRRIGATION, INC.,  
13 an Arizona corporation and SPOKANE  
14 WILBERT VAULT CO., a Washington  
15 corporation, d/b/a WILBERT PRECAST,

Defendants.

And

12 TAYLOR ENGINEERING, INC., a Washington  
13 corporation,

Third-Party Plaintiff,

v.

16 ACI NORTHWEST, INC., an Idaho corporation;  
17 STRATA, INC., an Idaho corporation; and  
18 SUNDANCE INVESTMENTS, LLP, a limited  
liability partnership,

Third-Party Defendants.

And

21 ACI NORTHWEST, INC., an Idaho corporation,

Cross-Claimant,

v.

24 AMERICAN BANK, a Montana banking  
25 corporation, BRN DEVELOPMENT, INC., an  
26 Idaho corporation, BRN INVESTMENTS, LLC,

AMERICAN BANK'S RESPONSE TO ACI NORTHWEST, INC.'S  
MOTION TO STRIKE THE AFFIDAVIT OF BRYAN KLEIN - 2

1 an Idaho limited liability company, LAKE VIEW  
2 AG, a Liechtenstein company, BRN-LAKE  
3 VIEW JOINT VENTURE, an Idaho general  
4 partnership, ROBERT LEVIN, Trustee for the  
5 ROLAND M. CASATI FAMILY TRUST, dated  
6 June 5, 2008, E. RYKER YOUNG, Trustee for  
7 the E. RYKER YOUNG REVOCABLE TRUST,  
8 MARSHALL CHESROWN a single man,  
9 THORCO, INC., an Idaho corporation,  
10 CONSOLIDATED SUPPLY COMPANY, an  
11 Oregon corporation, THE TURF  
12 CORPORATION, an Idaho corporation,  
13 WADSWORTH GOLF CONSTRUCTION  
14 COMPANY OF THE SOUTHWEST, a Delaware  
15 corporation, POLIN & YOUNG  
16 CONSTRUCTION, INC., an Idaho corporation,  
17 TAYLOR ENGINEERING, INC., a Washington  
18 corporation and PRECISION IRRIGATION,  
19 INC., an Arizona corporation,

20  
21  
22  
23  
24  
25  
26  
Cross Claim Defendants.

1. **Introduction.**

American Bank submits this memorandum, the affidavit of Mr. Klein, dated November 22, 2011, the affidavit of appraisal, Dean Paauw dated November 22, 2011, and the affidavit of Elizabeth A. Tellessen dated November 22, 2011, in response to ACI's motion to strike the Affidavit of B. Klein. Bryan Klein has submitted three affidavits to this court based on his personal knowledge and in his capacity as President of American Bank.<sup>1</sup> No party has previously questioned Mr. Klein's competency to testify as to the matters set out in his affidavits, in particular, with regard to the records of American Bank. But, in response to ACI's inquiry American Bank submits Mr. Klein and Mr. Paauw's affidavits,

<sup>1</sup> Affidavit of Bryan Klein in Support of Plaintiff's Memorandum re: Motion for Partial Summary Judgment – seeking foreclosure of mortgage on Black Rock North dated July 14, 2010; Affidavit of Bryan Klein in response to ACI's Motion to Dismiss, dated September 7, 2011 and Affidavit of Bryan Klein in Support of Partial Summary Judgment re: ACI's Cross Claim Court 4, dated August 19, 2011.

AMERICAN BANK'S RESPONSE TO ACI NORTHWEST, INC.'S  
MOTION TO STRIKE THE AFFIDAVIT OF BRYAN KLEIN - 3

*Winston & Cashatt*  
A PROFESSIONAL SERVICE CORPORATION  
250 Northwest Blvd., Suite 206  
Coeur d'Alene, Idaho 83814  
Phone: (208) 667-2103

1 which set forth the specific facts of Mr. Klein's firsthand knowledge, and the genesis of the opinions of  
2 the as-is market value of Black Rock North. Based on this information American Bank requests the  
3 court deny ACI's motion to strike.

4 **2. Statement of Relevant Facts.**

5 Bryan Klein joined American Bank on July 17, 2007. (Aff. B. Klein, Nov. 22, 2011, ¶ 2) He  
6 replaced Chief Operating Officer, Mark Hendrickson. (Aff. B. Klein, Nov. 22, 2011, ¶ 2) Mr.  
7 Hendrickson had been responsible for the BRN Development credit, and thus, upon taking his position,  
8 Mr. Klein became responsible for the BRN Development credit. (Aff. B. Klein, Nov. 22, 2011, ¶ 2, Aff.  
9 E. Tellessen 2.3; American Bank 30(b)(6) Dep.—L. Royer p. 304 ll. 2-3; Dep. M. Hendrickson p. 18 l.  
10 18- p. 19 l. 19) Therefore, from July 17, 2007 forward Mr. Klein was primarily responsible for  
11 management and administration of the BRN Development credit. (Aff. B. Klein, Nov. 22, 2011, ¶ 2) As  
12 the person responsible for the BRN Development credit, the credit file, both paper and electronic were at  
13 all times within his direct control. (Aff. B. Klein, Nov. 22, 2011, ¶ 3) All of the documents contained  
14 therein, including the entire appraisals referenced in his August 19, 2011 affidavit are contained in that  
15 file and have been produced to ACI. (Aff. B. Klein, Nov. 22, 2011, ¶ 4; Aff. E. Tellessen 3.6)

16 American Bank requested that Dean Paauw, presently the owner of Masters Valuation Services  
17 and formerly of Cushman & Wakefield, prepare appraisals of Black Rock North. (Aff. B. Klein, Nov.  
18 22, 2011, ¶ 7) Each of the appraisals completed by Dean Paauw relating to Black Rock North contained a  
19 letter-opinion of the as-is market value of Black Rock North, which is consistent with the as-is market  
20 value contained in the body of the appraisal. (Aff. D. Paauw ¶¶ 4-6) American Bank trusted and relied  
21 on those opinions in making business decisions related to the BRN Development credit. (Aff. B. Klein,  
22  
23  
24  
25  
26



1 Aug. 19, 2011, ¶3; Nov. 22, 2011 ¶ 4; Aff. E. Tellessen 2.3; American Bank 30(b)(6) Dep.—L. Royer  
2 pp. 161-162, p. 243 l. 8- p. 244 l.10)

3 **3. Legal Authority.**

4 American Bank requests the court consider the affidavits submitted in support of this response as  
5 also supplemental to the affidavits submitted in support of its motion for partial summary judgment  
6 regarding count 4 of ACI's cross-claim. Idaho Rule of Civil Procedure 56(e) provides in pertinent part  
7 "[t]he court may permit affidavits to be supplemented or opposed by...further affidavits." IRCP 56(e).  
8 Furthermore, the court has broad discretion to determine the admissibility of evidence. R. Homes  
9 Corporation v. Herr, 142 Idaho 87, 91, 123 P.3d 720 (2005) [hearsay evidence excluded where  
10 exception to IRE 801(d)(2)(D) not satisfied]. A memorandum or report is admissible if it is a record of  
11 regularly conducted business activity or when there are circumstantial guarantees of trustworthiness.  
12 IRE 803(6) and (24).  
13  
14

15 ACI asserts that the evidence submitted in Mr. Klein's August 19, 2011 affidavit lacks a  
16 sufficient foundation rendering it inadmissible on summary judgment. Although American Bank  
17 disputes that there is not sufficient foundation to allow the facts to be considered on summary judgment,  
18 it submits Mr. Klein and Dean Paauw's affidavits in response to this motion and in support of the  
19 motion for summary judgment to cure any alleged or perceived deficiencies.  
20

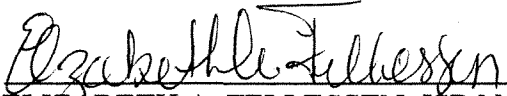
21 The facts included in Mr. Klein and Mr. Paauw's affidavits address the issues regarding the  
22 foundation for the opinions of as-is market value of Black Rock North. The affidavits do not seek to  
23 introduce any new evidence material to the issues on summary judgment, but only provide additional  
24 foundation establishing that the facts presented would be admissible at trial.  
25  
26

1 Furthermore, ACI has been on notice of American Bank's intent to have the opinions of as-is  
2 market value admitted and relied upon as evidence in support of its motion for partial summary  
3 judgment since August. These opinions contain all of Mr. Paauw's contact information, and counsel for  
4 ACI was provided with Mr. Paauw's available dates for a deposition. (Aff. E. Tellessen 3.6) But, no  
5 deposition has been scheduled or taken, nor any evidence submitted to refute the opinions of the as-is  
6 market value of Black Rock North.  
7

8 **4. Conclusion.**

9 American Bank requests the court deny ACI's motion to strike the affidavit of Bryan Klein  
10 because the exhibits attached to his affidavit are business records of American Bank, are trustworthy and  
11 have been provided to ACI sufficiently in advance of the hearing on summary judgment in order for it to  
12 meet or refute the same. Furthermore, the affidavits submitted in response to ACI's motion are sufficient  
13 to cure any defect in the foundation for admission of the evidence. Therefore, American Bank requests  
14 the court deny ACI's motion to strike.  
15

16 DATED this 22 day of November, 2011.

17   
18 ELIZABETH A. TELLESSEN, ISB No. 7393  
19 WINSTON & CASHATT  
20 Attorneys for Plaintiff American Bank  
21  
22  
23  
24  
25  
26

CERTIFICATE OF SERVICE

The undersigned hereby certifies under penalty of perjury under the laws of the State of Idaho that on 22 day of November, 2011, the foregoing was caused to be served on the following persons in the manner indicated:

John R. Layman  
Layman, Layman & Robinson, PLLP  
601 South Division Street  
Spokane, WA 99202

VIA REGULAR MAIL  
VIA CERTIFIED MAIL  
HAND DELIVERED  
BY FACSIMILE 509-624-2902  
BY ELECTRONIC MAIL  
VIA FEDERAL EXPRESS

☐  
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Attorney for Defendants BRN Development, BRN Investments,  
BRN-Lake View Joint Venture, Marshall Chesrown, Lake  
View AG, and Robert Levin, Trustee For The Roland M. Casati  
Family Trust, Dated June 5, 2008 and E. Ryker Young, Trustee  
of the E. Ryker Young Revocable Trust

Charles B. Lempesis  
Attorney at Law  
201 W. Seventh Avenue  
Post Falls, ID 83854

VIA REGULAR MAIL  
VIA CERTIFIED MAIL  
HAND DELIVERED  
BY FACSIMILE (208) 773-1044  
BY ELECTRONIC MAIL  
VIA FEDERAL EXPRESS

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Attorney for Defendant Thorco, Inc.

Edward Anson  
Witherspoon, Kelley, Davenport & Toole, P.S.  
608 Northwest Blvd. #300  
Coeur d'Alene, ID 83814

VIA REGULAR MAIL  
VIA CERTIFIED MAIL  
HAND DELIVERED  
BY FACSIMILE (208) 667-8470  
BY ELECTRONIC MAIL  
VIA FEDERAL EXPRESS

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Attorney for Defendants Wadsworth Golf Construction  
Company of the Southwest, The Turf Corporation and  
Precision Irrigation Inc.

Richard Campbell  
Campbell Bissell  
7 South Howard Street #416  
Spokane, WA 99201

VIA REGULAR MAIL  
VIA CERTIFIED MAIL  
HAND DELIVERED  
BY FACSIMILE 509-455-7111  
BY ELECTRONIC MAIL  
VIA FEDERAL EXPRESS

☐  
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☐

Attorney for Defendant Polin & Young Construction

Greg Embrey  
Witherspoon, Kelley, Davenport & Toole  
608 Northwest Blvd. #300  
Coeur d'Alene, ID 83814

VIA REGULAR MAIL  
VIA CERTIFIED MAIL  
HAND DELIVERED  
BY FACSIMILE (208) 667-8470  
BY ELECTRONIC MAIL  
VIA FEDERAL EXPRESS

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Attorney for Defendant Taylor Engineering

AMERICAN BANK'S RESPONSE TO ACI NORTHWEST, INC.'S  
MOTION TO STRIKE THE AFFIDAVIT OF BRYAN KLEIN - 7

*Winston & Bashatt*  
A PROFESSIONAL SERVICE CORPORATION  
250 Northwest Blvd., Suite 206  
Coeur d'Alene, Idaho 83814  
Phone: (208) 667-2103

2034

Randall A. Peterman & C. Clayton Gill  
Moffatt, Thomas, Barrett, Rock & Fields, Chartered  
101 South Capital Blvd., 10<sup>th</sup> Floor  
P.O. Box 829  
Boise, Idaho 83701

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Co-Attorney for Plaintiff  
Doug Marfice  
Ramsden & Lyons  
700 Northwest Boulevard  
Coeur d'Alene, ID 83816-1336

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Attorney for Defendant Ryker Young, Trustee of the Ryker  
Young Revocable Trust

Rick Harris  
Ramsden & Lyons  
700 Northwest Boulevard  
Coeur d'Alene, ID 83816-1336

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Attorney for Court Appointed Receiver

Steven C. Wetzel  
James, Vernon & Weeks  
1626 Lincoln Way  
Coeur d'Alene, ID 83814

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Attorneys for Third Party Defendant ACI

  
ELIZABETH A. TELLESSEN

AMERICAN BANK'S RESPONSE TO ACI NORTHWEST, INC.'S  
MOTION TO STRIKE THE AFFIDAVIT OF BRYAN KLEIN - 8

*Winston & Cashatt*  
A PROFESSIONAL SERVICE CORPORATION  
250 Northwest Blvd., Suite 206  
Coeur d'Alene, Idaho 83814  
Phone: (208) 667-2103